
THREE IS NOT A CROWD: ONLINE MEDIATION-ARBITRATION IN BUSINESS TO CONSUMER INTERNET DISPUTES

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ABSTRACT

Disputes on the World Wide Web are growing as rapidly as e-commerce itself. Online Dispute Resolution ("ODR") is a mechanism that is perceived as providing fair, efficient, effective, convenient and inexpensive solutions for disputes in the global e-commerce market.

As part of the trend of the development and study of ODR, this article deals with a relatively innovative process: online mediation-arbitration ("online med-arb"). Online med-arb has three components: mediation, arbitration and technology. Alongside the presentation of this process, including its three components, their implementation, advantages and disadvantages, this article demonstrates how the process succeeds in overcoming the disadvantages and concerns associated with the existing ODR mechanisms (e.g., online mediation and online arbitration) when dealing with international business-to-consumer Internet disputes. In addition, this article proposes an improved model of online med-arb for dealing with disputes of this nature, with the hope that adoption of the model will advance both international trade and consumer protection in these disputes.

Undoubtedly, the advent of the Internet presented a serious challenge for the Alternative Dispute Resolution ("ADR") movement. Resolving disputes over the Internet is likely to play an important role in the future of electronic commerce. As United States

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Congressional proclamations make clear, the development of electronic commerce over the Internet is a broad economic and public interest for the United States. However, it is clear that this development cannot take place without a fair, efficient, and available system for resolving disputes involving the Internet, that promises accessibility to consumers to receive fair remedies with respect to their e-merchant claims. Online med-arb is likely to be one of the harbingers of this promise.

Disputes—Getting the Benefits of All Methods.....	918
4.2.2.1. <i>Adoption of the Advantages of Mediation (While Disposing of the Disadvantages of Arbitration)</i>	918
4.2.2.2. <i>Adoption of the Advantages of Arbitration (While Disposing of the Disadvantages of Mediation)</i>	921
4.2.2.3. <i>Added Advantages of Med-Arb in International B2C Internet Disputes</i>	924
4.2.2.4. <i>Adoption of the Advantages of the Online Process</i>	926
4.2.2.5. <i>Criticism and Alleged Disadvantages of Med-Arb</i>	929
4.3. Recommendations: Towards an Upgraded Model of Online Med-Arb Dealing with B2C Internet Disputes	930
4.3.1. Med-Arb Agreements	931
4.3.2. Means to strengthen the parties' autonomy	931
4.3.3. Additional security and cautionary measures to ensure consent	932
4.3.4. The trustmark program	933
4.3.5. Concerns regarding due process and technological gaps	935
4.3.6. Confidentiality and privacy concerns.....	936
4.3.7. The problem of trust.....	937
4.3.8. A public awareness campaign	938
4.3.9. The problem of cost	938
4.4 Summary	939
5. CONCLUSION	940

1. INTRODUCTION

Making national courts available for a dispute that involves, for example, an \$80 pair of shoes purchased online in a cross-border transaction, simply does not serve as an adequate path to an effective remedy.¹

The phenomenon of electronic commerce on the web is rapidly expanding and existing data indicates that it can be expected to continue to grow.² Together with the growth of e-commerce, there has been growth of other phenomena as well, namely, the controversies that were created around this commerce (mainly involving the issues of price, quality and time of delivery).³ In an attempt to properly address these controversies and in view of the assertion that “for consumers in such transactions, access to courts is not access to justice,”⁴ in the last decade and a half, a mechanism has been developed called Online Dispute Resolution (“ODR”), which includes mechanisms for the online resolution of disputes.

It seems that there are two main challenges faced by ODR with respect to business-to-consumer Internet disputes: One, to ensure that the average consumer in the virtual world receives consumer protection equal to that which he would receive in the real world and two, that the consumer receives Alternative Dispute Resolution (“ADR”) services that are not inferior in quality due to the fact that they are provided online. Moreover, there is no doubt that in order

¹ Ronald A. Brand, *Party Autonomy and Access to Justice in the UNCITRAL Online Dispute Resolution Project 3* (Legal Studies Research Paper Series, Working Paper No. 2012-2, 2012), available at <http://ssrn.com/abstract=2125214> [perma.cc/DHU3-89Q9].

² *Id.* at 8. See also Thomas Schultz et al., *Electronic Communication Issues Related to Online Dispute Resolution Systems*, Eleventh Int’l World Wide Web Conference, 1 (2002), 1, available at <http://ssrn.com/abstract=899108> [perma.cc/XR8E-VHGL] (“The number of businesses and customers transacting over the Internet is increasing rapidly . . .”).

³ Schultz, *supra* note 2, at 1. See also Haitham A. Haloush & Bashar H. Malwaki, *Internet Characteristics and Online Alternative Dispute Resolution*, 13 HARV. NEGOT. L. REV. 327, 330 (2008) (“[B]usiness relationships are entering a new digital era in which, just as conflicts could reasonably be expected to grow as online transactions increase, conflicts can be expected to grow as online collaborations increase.”).

⁴ Brand, *supra* note 1, at 3.

to advance international e-commerce and, taking into account the limitations of traditional court litigation in effectively addressing business-to-consumer disputes, as will be discussed below, there is a vital need to improve the existing ODR mechanism and to make it more sophisticated. These improvements will enable it to successfully build consumer confidence and increase access to justice in an online business environment. In other words, it may be said that the future of online commerce is dependent, to a great extent, on the development and improvement of such a mechanism.⁵

The most prominent of the various ODR methods are online mediation and online arbitration which are perceived as appropriate for resolving disputes arising out of the transnational commercial transactions between businesses and clients located in different countries that have grown on the Internet.⁶ However, and in spite of the fact that in the last decade a great deal of attention has been paid to these means by various entities,⁷ it seems that they are not free of defects and doubts, both those that are unique to each of them and those that are common to them and to other means of ODR.

Mediation-arbitration ("med-arb"), one of the innovative means of ADR, has been growing rapidly in recent years and gaining recognition throughout the world as one of the improved means for dispute resolution. It is the assertion of this article that this model, when it appears in its online form, i.e., **online** med-arb, and is upgraded (as is proposed in this article), is likely to dispense with most of the concerns that are the lot of other ODR mechanisms that exist currently in the field with respect to business-to-consumer Internet disputes (such as online mediation and online arbitration). The article also notes that aside from the fact that online med-arb is likely to dispense of the disadvantages of the existing ODR mechanisms,

⁵ Schultz, *supra* note 2, at 1-2, 12. See also Philip Johnson, *Enforcing Online Arbitration Agreements for Cross-Border Consumer Small Claims in China and the United States*, 36 HASTINGS INT'L & COMP. L. REV. 577, 582 (2013) ("To foster the continued commerce, an effective and legally enforceable -growth of international e .(".olution system for consumers must be createdinternational dispute res

⁶ Johnson, *supra* note 5, at 580-81.

⁷ See Johnson, *supra* note 5, at 581 ("The Chinese government's international commercial arbitration agency, the China International and Economic Arbitration Commission ("CIETAC"), has recognized the growing import of online arbitration in transnational e-commerce disputes, and recently promulgated the Online Arbitration Rules to foster the promotion of online arbitration of e-commerce disputes"). See also *id.* at 585 ("Legislators and courts in China and the U.S. alike have recognized the benefits which online arbitration provides.").

as stated, it also has independent advantages of its own, that are likely to make a substantial contribution to dispute resolution of the kind mentioned and therefore to significantly advance the development of Internet commerce. It should be remembered that the encouragement of electronic commerce is a matter of public policy in the United States.⁸ This article seeks to contribute to the promotion of this public policy interest.

This article is divided into four chapters in addition to the first introductory chapter. The second chapter defines key concepts and presents the background of the subject. The third chapter presents the advantages, alongside the concerns, that are characteristic of the mechanisms for the resolution of international business-to-consumer disputes, that currently exist on the Internet (e.g., online mediation and online arbitration). The fourth chapter details the online med-arb model. Alongside the presentation of the mechanism, presentation of its independent advantages and an analysis of the potential contained in it and dispensing with concerns relating to the existing mechanisms, as stated, the chapter presents, at the end, proposals for the adoption of the **upgraded model of online med-arb** for dealing with disputes of this kind. The fifth chapter is the conclusion.

2. DEFINITION OF CONCEPTS AND BACKGROUND OF THE SUBJECT

2.1. *Business-to-Consumer Internet Transaction/Disputes*

The term “business-to-consumer Internet transaction” (“B2C Internet transaction”), refers to the sale of goods and services over the Internet from business entities to individuals acting in their personal capacity.⁹

The term *business-to-consumer Internet disputes* refers to conflicts arising out of such transactions. The conflict may revolve around goods or services that were not delivered as promised, or were not

⁸ Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d)(2)(B) (2013) (“Congress finds that the unauthorized registration or use of trademarks as [I]nternet domain names or other identifiers of online locations (commonly known as cyber-squatting) . . . impairs *electronic commerce, which is important to the economy of the United States.*”) (emphasis added).

⁹ Haitham A. Haloush, *Online Alternative Dispute Resolution as a Solution to Cross-Border Electronic Commercial Disputes* 15 (2003) (unpublished Ph.D. thesis, University of Leeds), available at <http://etheses.whiterose.ac.uk/id/eprint/1394> [perma.cc/JG99-2MCR].

received at all, goods delivered that do not conform to their description or damaged or defective goods. In addition, disputes may arise when a consumer experiences difficulties in obtaining a refund, or due to the discovery of hidden costs or fraudulent advertising of the product offered.¹⁰

The vulnerability of the average consumer or his lack of confidence in the B2C Internet interaction may be attributed to a number of central factors:¹¹

First, in the real world, the buyer can examine the offered item prior to buying it. In a purchase in the virtual world, the buyer cannot do so and therefore is forced to rely upon the description of the product or a picture of it, as presented by the seller.

Second, traditionally, disputes involving consumer protection have rarely been international, because outside of the virtual world the individual consumer does not generally enter into international transactions or contracts. Since the world of Internet commerce has changed this picture, the consumer finds himself at times without protection with respect to his Internet purchases, with the local, national law changing from state to state and likely to be unsatisfactory.

Third, for the most part, the economic value of transactions of this nature is likely to be low and does not justify the costs of a legal process. Thus, when a conflict arises, the consumer finds himself demanding redress from an online merchant that, in many cases, is a company located in an unknown or far-away location, with the costs of travel, loss of time and the costs of the legal process making pursuit of redress unviable for the consumer. As has been noted, "traditional judicial mechanisms for legal recourse [do] not offer an adequate solution for cross-border e-commerce disputes, in small-value, high-volume business-to-business and business-to-consumer disputes."¹²

Fourth, long-distance transactions, including B2C transactions, are characterized by the fact that one party needs to be the first to take action, while taking the risk that the other party will not carry out his side of the transaction when his turn comes. Typically, this party will be the buyer. In this manner, an opening for online fraud is sometimes created, and by the time the buyer has discovered this,

¹⁰ *Id.*

¹¹ *Id.* at 16-18.

¹² Brand, *supra* note 1, at 3.

the seller is likely to have shut down the site and moved to another site (under another name or logo, where he continues to defraud).

Moreover, in the case of fraud, the plaintiff is required to detail the particulars relating to the matter, including the time, place and content of the fraud. Meeting these requirements is likely to be problematic in the context of online fraud, since in many cases the buyer lacks the facts and documents relating to the sales transaction or the breach on the part of the merchant. The exchange of facts or documents between the buyer and seller constitutes, for the most part, the sole evidence of the existence of a transaction. However, there are hidden and sophisticated ways to create later changes with respect to the dates of sending and receiving electronic notifications, the content of such notifications or the identity of the sender. In effect, there are now ways that can make it impossible to trace data on the World Wide Web back to its point of origin. Thus, it transpires that the consumer is likely to encounter a great deal of difficulty in proving Internet fraud.¹³

2.2. Online Dispute Resolution

The term Online Dispute Resolution ("ODR") refers to the entire spectrum of alternatives for the resolution of disputes outside of court (referred to, generally as "Alternative Dispute Resolution" or "ADR"),¹⁴ which is carried out while using communications and other means of technology, particularly the Internet.¹⁵ ODR is, in effect, a particular kind of ADR that draws most of its ideas and methods from the latter.¹⁶ While its traditional "brother," ADR (which includes, inter alia, mediation, arbitration and med-arb) starts from the understanding that the dispute resolution process includes three partners, i.e., the parties to the dispute and the neutral third party,

¹³ Haloush, *supra* note 9, at 17.

¹⁴ *Id.* at 1 ("The leading English text on ADR defines it as a '[r]ange of procedures that serve as alternative to litigation through the courts for resolution of disputes, generally involving the intercession and assistance of neutral and impartial third.'").

¹⁵ Melissa C. Tyler & Mark McPherson, *Online Dispute Resolution and Family Disputes*, 12 J. FAM. STUD. 1, 5 (2006). See also Phillipe Gillieron, *From Face-to-Face to Screen-to-Screen: Real Hope or True Fallacy?*, 23 OHIO ST. J. DISP. RESOL. 301, 302 (2008) ("ODR can be defined as any 'form of alternative dispute resolution (ADR) that incorporate[s] the use of the Internet' or technological tools.").

¹⁶ Abraham N. Tennenbaum & Ofir Liber, *Online Alternative Dispute Resolution – The Present and the Future*, 3 SHA'AREI MISHPAT 75, 77 (2002) (Isr.).

ODR adds the *fourth partner* – technology.¹⁷ ODR includes, therefore, a broad ensemble of tools and technological means such as e-mail, conference calls, direct mailing, Internet bulletin boards and a variety of video possibilities, intended to enable the resolution of disputes in cases in which the traditional alternatives are less viable and at times impossible.¹⁸

The beginnings of ODR are in the second half of the 1990s, with the development and flourishing of electronic commerce. Out of an understanding regarding the limitations of the traditional channels for dispute resolution in dealing with disputes arising on the Internet (such as electronic commerce disputes), new channels were developed that offered online dispute resolution. The traditional channels, such as the courts, negotiations, mediation and arbitration were shown to be complicated in that at times they raised complex questions of jurisdiction and choice of law; as financially inefficient due to the cost of holding international processes between surfers living at a great distance from one another; and as ineffective due to the difficulty of enforcing the outcomes and rights procured. Thus, the need arose for a mechanism that could serve as an inexpensive, convenient and accessible alternative.¹⁹ Among the new technological channels that ODR offers are online negotiation, online mediation and online arbitration.²⁰ ODR services are provided by neutral private bodies under published rules of procedure, while the ODR mechanism is perceived as one that can provide efficient, fair, low cost and adaptable solutions to resolve disputes in the global e-commerce market.²¹

Over the years, as global e-commerce has flourished, more e-

¹⁷ See generally ETHAN KATSH & JANET RIFKIN, *ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE* 93-116 (2001).

¹⁸ GABRIELLE KAUFMANN-KOHLER & THOMAS SCHULTZ, *ONLINE DISPUTE RESOLUTION: CHALLENGES FOR CONTEMPORARY JUSTICE* 7 (2004).

¹⁹ Orna Rabinovich-Einy, *Technology and Dispute Resolution: Contribution of the Internet to the Mediation Revolution*, U. HAIFA J. 3, 4 (2006). See also Ethan Katsh & Orna Rabinovich-Einy, *Technology and the Future of Dispute System Design*, 17 HARV. NEGOT. L. REV. 152 (2012) (describing the circumstances that led to the rise of online dispute resolution).

²⁰ Johnson, *supra* note 5, at 582. See also Julio César Betancourt & Elina Zlatan-ska, *Online Dispute Resolution (ODR): What Is It, and Is It the Way Forward?*, 79 INT'L J. ARB., MEDIATION & DISP. MGMT. 256, 258 (2013), available at <http://ssrn.com/abstract=2325422> [perma.cc/TL63-ETA7] ("Within the vast array of ODR mechanisms, negotiation, mediation, and arbitration appear to be the most commonly practised.").

²¹ Johnson, *supra* note 5, at 585.

companies have turned to online dispute resolution as their best option for settling transactional e-commerce disputes.²² A trend of development of ODR both in **quantitative** and in **geographic** terms may be pointed to. Regarding the **quantitative** development—if in 2006 there were 149 sites providing ODR services,²³ in 2010 the number of disputes resolved online, solely through the eBay site, reached 60 million!²⁴ Regarding the **geographic** development—while in the first years most of the activity was concentrated in North America, with time, additional areas have been added, until at present it can be said that there is almost no area in which ODR services are not provided.²⁵ These services can be found in North America,²⁶ throughout Europe,²⁷ in Australia,²⁸ in Asia,²⁹ in Israel,³⁰ in Latin

²² Johnson, *supra* note 5, at 586.

²³ Tyler & McPherson, *supra* note 15, at 6–7.

²⁴ Ethan Katsh, *ODR: A Look at History – A Few Thoughts about the Present and Some Speculation about the Future*, in *ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE – A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION* 21, 24 (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainy eds., 2011).

²⁵ Tyler & McPherson, *supra* note 15, at 6–7.

²⁶ See generally Arthur Pearlstein, Bryan Hanson & Noam Ebner, *ODR in North America*, in *ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE – A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION* 443 (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainy eds., 2011).

²⁷ See generally Marta Poblet and Graham Ross, *ODR in Europe*, in *ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE – A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION* 465 (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainy eds., 2011).

²⁸ See generally Tania Sourdin and Chinthaka Liyanage, *The Promise and Reality of Online Dispute Resolution in Australia*, in *ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE – A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION* 483 (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainy eds., 2011).

²⁹ See generally Zhao Yun et al., *Online Dispute Resolution in Asia*, in *ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE – A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION* 511 (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainy eds., 2011).

³⁰ In Israel, the Benoam system, founded by Adv. Yehuda Tunik, was an online arbitration system created to manage a high volume of small-scale claims between opposing insurance companies. The system was a computerized administration based on an Internet computerization platform. Benoam, which has been discontinued, primarily handled auto insurance subrogation claims for claims involving motor vehicles of up to 100,000 NIS per claim. Orna Rabinovich-Einy & Roei Tsur, *The Case for Greater Formality in ADR: Drawing on the Lessons of Benoam's Private Arbitration System*, 34 VT. L. R. 529, 542 (2010); Orna Rabinovich-Einy & Roei Tsur, *Unclogging the Collision Course: The Evolution of Benoam, an Online Private Court*, ACRESOLUTION 8 (2010).

America, and even in Africa.³¹

2.3. Online Mediation

Online mediation is one of the most widespread forms of online dispute resolution.³² Traditional mediation is, in the main, a voluntary process that enables parties to a dispute to resolve the dispute between them with the assistance of a neutral third party, the mediator, who is not authorized to decide with respect to the dispute. The mediator communicates with both parties and tries to bring them to a win-win agreement that addresses the interests of each of them.³³ In effect, in the framework of the process, the parties negotiate with one another, with the mediator assisting them to identify the matters as to which they disagree and their main interest, to develop options for a solution and to examine existing alternatives in order to achieve a voluntary solution that is satisfactory to both parties.³⁴

In most of its aspects, online mediation reflects traditional mediation.³⁵ The online mediation process opens with a complaint that is registered with a provider of online ODR services offering mediation services. In many cases there is a link to such a provider on the electronic business web site that informs the users of the site that they are entitled, through clicking on the link, to fill out a complaint form. The next stage is the appointment of a mediator by the provider of ODR services in each case in which the parties themselves do not succeed in agreeing upon a mediator. In the next stage, the mediator contacts the defendant and invites him to participate in the online mediation process with the objective of resolving the dispute.³⁶ Before the process begins, the parties agree upon a number

³¹ See generally Mohamed S. Abdel Wahab, *Online Dispute Resolution for Africa*, in *ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE — A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION* 561 (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainy eds., 2011).

³² Noam Ebner, *e-Mediation*, in *ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE — A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION* 369, 370, 397 (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainy eds., 2011); Haloush & Malkawi, *supra* note 3, at 334.

³³ Schultz, *supra* note 2, at 3.

³⁴ Haloush & Malkawi, *supra* note 3, at 334.

³⁵ Rebecca Brennan, *Mismatch.com: Online Dispute Resolution and Divorce*, 13 *CARDOZO J. CONFLICT RESOL.* 197, 211 (2011).

³⁶ Haloush, *supra* note 9, at 73–76.

of procedural ground rules. In the next stage, the mediator examines the background documents provided by each of the parties and through them identifies the issues in dispute. Then, the parties are asked to propose solutions to the dispute. The mediator considers the solutions, analyzes them and works them into a concrete proposed solution that is meant to satisfy both of the parties.³⁷ In the next stage each party is asked to submit his reaction to the proposed solution, together with any questions he may have in a kind of ongoing ping-pong, until a solution is reached. In conclusion, the mediator holds a kind of summation forum that explicates the result reached, together with the terms and limits of each of the conditions of the agreement.³⁸

It bears emphasis that the most important characteristic of the mediation process (including online mediation) is **the parties' autonomy, i.e., the voluntary nature of the process**.³⁹ The mediator, as distinguished from the judge or the arbitrator, has no power of enforcement. All of the substantive decisions in the process are in the exclusive control of the parties. Among other things, the parties choose whether to participate in the process and they have the freedom to leave it at any time without having to offer any reason, which will, of course, end the process. In the course of the process, the parties may present their arguments without restrictions, and they are not subject to applicable law, either substantive or procedural. The result of the process, i.e., a mediation agreement or settlement, which is the creation and choice of the parties, also constitutes, of course, a clear expression of realization of this autonomy.

The mediation legislation in the United States expresses the recognition of the idea of personal autonomy and self-determination

³⁷ *Id.*

³⁸ *Id.* See also Lucille M. Ponte, *Throwing Bad Money After Bad: Can Online Dispute Resolution (ODR) Really Deliver the Goods for the Unhappy Internet Shopper?*, 3 TUL. J. TECH & INTELL. PROP. 55, 70-78 (2001) (describing the typical steps for mediation services in an online environment).

³⁹ In the scholarly literature, the accepted approach is that mediation relies first and foremost on the idea of personal autonomy and the self-determination of the parties. See Robert A. A. Baruch Bush & Joseph P. Folger, *The Promise Of Mediation: Responding To Conflict Through Empowerment and Recognition*, 11-12 (1994) (discussing mediators and parties' roles in different mediation techniques); Lon L. Fuller, *Mediation – Its Forms and Functions*, 44 S. CAL. L. REV. 305, 315 (1971) (discussing how arbitration is heavily influenced by the wills of the party, not the "authority").

as a central foundation of the mediation process.⁴⁰ Mediation negotiations are perceived as enabling the parties to actualize their personal autonomy and to realize their interest in control of their future through operating personal will without the decision of an outside entity.⁴¹ In addition, actualizing personal autonomy of the parties by resolving disputes through the mediation process is perceived as contributing both to enhancing the social skills of the parties and to the array of relationships in society in general.⁴²

It is important to note that in spite of the fact that in the framework of the parties' autonomy in the process they are not subject to applicable law, online mediation does not, in most cases, operate in a legal vacuum and is not entirely cut off from the law. Firstly, the online model operates according to what is termed *bargaining in the shadow of the law*,⁴³ with each of the conditions of the agreement being applicable and viable in accordance with the law. Moreover, although the parties are not formally subject to the law, the content of the law with respect to their rights and/or the scope of their liability and obligations influences, if only indirectly, the proposals for a resolution of the dispute and is likely to fashion their choices with respect to the agreement being shaped. Additionally, the mediator also takes the substantive law into consideration in helping to mediate the dispute. Moreover, for the purpose of making the mediation agreement binding, the parties can have the mediator draft it in a formal way for their signature. In the end, online mediation must rely on the law to render it valid and effective, in order for it to exist in the legal order.

⁴⁰ AAA, ABA & ACR, MODEL STANDARDS OF CONDUCT FOR MEDIATORS §1(2005).

⁴¹ Lon L. Fuller, *Mediation – Its Forms and Functions*, 44 S. CAL. L. REV. 305, 315 (1971).

⁴² BUSH & FOLGER, *supra* note 39. See generally Robert A. Baruch Bush & Sally Ganong Pope, *Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation*, 3 PEPP. DISP. RESOL. L.J. 67 (2002); Dafna Lavi, *Transformative Mediation – The Substantive and Procedural Aspects – A Proposal to Adopt a New-Old Model into the Current Discourse*, 5 SHA' AREI MISHPAT 131 (2009) (Isr.) ("They do not want to be victimized, or to victimize the other party, in the process of dealing with their dispute; rather, they want to come out of the process feeling better about themselves, and about the other party.").

⁴³ Haloush & Malkawi, *supra* note 3, at 336.

2.4. Online Arbitration

Arbitration is a quasi-judicial process, at the end of which a neutral third party, the arbitrator, renders a final and legally binding decision, the award, which can be enforced by the parties and can be registered with a court and thereafter enforced like a court judgment.⁴⁴

Online arbitration is, in effect, an electronic version of offline arbitration,⁴⁵ including the components of traditional (offline) arbitration beginning with an 'online arbitration agreement' and ending with an 'online arbitral award.'⁴⁶ Online arbitration takes place exclusively through the use of the Internet and digital technology.⁴⁷ In such arbitration, the arbitrator is appointed by the parties or by a recognized arbitration institution and he decides the case in an arbitration decision, after hearing the parties' arguments and examining their evidence.⁴⁸ In the course of arbitration proceedings, the arbitrator, the parties, the experts and the witnesses use electronic devices, with the process integrating the use of sophisticated software and hardware devices to facilitate such use.⁴⁹

From the procedural angle, in most cases the procedure begins when a complaint is registered with a provider of online arbitration services.⁵⁰ In some cases, the electronic business web site includes a link labeled "complaint," and informs the consumer that by clicking on the link he can fill out a complaint form. In the next stage, a provider of online arbitration services appoints an arbitrator to resolve the dispute (if the parties do not agree on their own initiative to a particular arbitrator). The arbitrator contacts the defendant and invites him to participate in the online arbitration process. In the next stage the online hearing process begins when the parties clarify the issues in dispute, make their arguments and present their evidence. When the hearing process ends, the arbitrator renders his judgment and provides it to the parties electronically and within the

⁴⁴ Haloush, *supra* note 9, at 79.

⁴⁵ Betancourt & Zlatanska, *supra* note 20, at 262.

⁴⁶ *Id.*

⁴⁷ Johnson, *supra* note 5, at 583.

⁴⁸ "The Virtual Magistrate" was the first site that provided such a service. Karen Stewart & Joseph Matthews, *Online Arbitration of Cross-Border, Business to Consumer Disputes*, 56 U. MIAMI L. REV. 1111, 1123 (2002).

⁴⁹ Betancourt & Zlatanska, *supra* note 20, at 262.

⁵⁰ Haloush & Malkawi, *supra* note 3, at 342.

timeframe determined in advance. The final outcome of the e-arbitration process would be an award imposed by the third party.⁵¹

In the international context, with respect to cross-border commercial disputes, the traditional (offline) arbitrator operates under the auspices of an international legal framework and is based upon well-established commercial practice. In effect, international commercial arbitration derives its sustenance from the interaction between three central layers of legislation.⁵² The first layer is the private law of parties' contract as embodied in the arbitration agreement. This layer includes the substantive and procedural law governing arbitration, the authority of the arbitrator, the place of the arbitration, and the effect of the arbitration judgment. In effect, the arbitration agreement is the vital source of arbitration from which it derives its authority, its content, and its boundaries. The arbitration agreement is likely to determine the identity of the arbitrator, how he is appointed and removed from his position, and the rules of evidence before the arbitrator, such as allowing or precluding discovery, defining the nature of pleading, defining the nature of the hearing, setting time limits for the parties' presentations, and the arbitral award.

The second layer of legislation is the national arbitration law. This law defines the range of arbitration permissible in the country and confers validity upon arbitration agreements within this scope. Most countries have similar legislation governing arbitration, ensuring harmony of enforcement across jurisdictions.⁵³

The final layer of legislation is the international enforcement treaties, the most important of which is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (hereinafter NYC), signed by most nations of the world. In this convention the signatory countries undertake that their national courts will recognize international arbitration agreements and arbitral awards and will enforce them (subject to certain reservations).⁵⁴

In the last decade **online arbitration** has become one of the pre-

⁵¹ *Id.*

⁵² Haloush & Malkawi, *supra* note 3, at 340–41.

⁵³ *Id.*

⁵⁴ Gary Born, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES: COMMENTARY AND MATERIALS 18 (1994).

ferred methods for the resolution of transnational commercial disputes between businesses and clients located in different countries.⁵⁵ The current legal framework for such arbitration relies upon various layers of soft and hard law regulatory instruments, consisting mainly of international conventions and model laws.⁵⁶ Many of the national arbitration laws throughout the world do not yet include provisions relating to online arbitration and in fact quite the opposite, include requirements that would seem to contravene the recognition of such arbitration (e.g., the requirement that an arbitration agreement or judgment be in writing, as shall be discussed in Chapter III, below). But in spite of all of this, there are institutions throughout the world that are trying to speed up online processes (including online arbitration) and to address these requirements.⁵⁷

In summary, it is possible to agree with the conclusion arrived at by Johnson that:

To foster the continued growth of international e-commerce, an effective and legally enforceable international dispute resolution system for consumers must be created. Online dispute resolution is the most promising method of effectively doing so. This is especially true for international business-to-consumer disputes.⁵⁸

However, and in spite of the diverse advantages of ODR and particularly of online mediation and arbitration to deal with B2C Internet disputes, each of these has its own inherent disadvantages. The following part will deal with these advantages and disadvantages.

3. ADVANTAGES AND CONCERNS REGARDING CURRENT MECHANISMS FOR RESOLVING BUSINESS-TO-CONSUMER INTERNET DISPUTES

3.1. *Online Dispute Resolution ("ODR")*

In general, the ODR mechanism **offers a number of advantages**, which are enhanced when dealing with international business-to-consumer disputes.

One of ODR's outstanding advantages is **its ability to overcome**

⁵⁵ Johnson, *supra* note 5, at 580–81.

⁵⁶ Mohamed S. Abdel Wahab, *ODR and eArbitration*, in *ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE*, *supra* note 24, at p. 399, 403–04.

⁵⁷ *Id.* at 404.

⁵⁸ Johnson, *supra* note 5, at 582.

obstacles such as place and distance. Through the use of online conversation, the various communications between people in different places can take place easily and quickly, almost anywhere and without the need for physical presence (often physical presence is not practical in international B2C Internet disputes).⁵⁹ This advantage is also likely to increase the ability to use a broad range of professional knowledge in the process, through the involvement of experts located at a distance who suddenly become available.⁶⁰ The virtual conversation in this context thereby opens up the possibility of creating new kinds of non-physical spaces in which virtual processes and tools can be used.

A further advantage is **the simplicity and convenience** of the process. Beyond good will and an Internet connection, the process requires almost nothing from the parties. There is no need to agree on a neutral place and to travel there, there is no need to coordinate schedules for a meeting, when providers of ODR services are available 24 hours a day, seven days a week.⁶¹ The process also entails significant **savings in time**, due to the fact that it is not necessary to hold meetings in person, to coordinate schedules between at least three people and to waste valuable time on travel.⁶² The savings in time contribute, as a matter of course, to **reduction of costs** as well. The fact that there is no need to rent premises for meetings also contributes to cost reduction.

In addition, the online dispute resolution process has a proven advantage in **reducing the stress of hostility between the parties**.⁶³ Hammond's studies, dealing with conflicts and their resolution, demonstrate that parties to a conflict feel calmer, less hostile and more confident of themselves in an environment of online dispute resolution.⁶⁴ Several users defined the online environment as less

⁵⁹ *Id.*

⁶⁰ See Ebner, *supra* note 32, at 377-78 ("Parties gain access to mediator expertise beyond that which might be available in any given geographical region [Moreover,] [e]xternal experts can be consulted with, or brought into the process as necessary, regardless of their geographical location, and without disrupting the process' dynamics.").

⁶¹ Gillieron, *supra* note 15, at 313.

⁶² *Id.* at 314.

⁶³ See Yoram Alroi, *Dispute Resolution – Win-Win Solution – Another Way is Possible*, 1 HAMISHPAT 311, 312, 335 (1993) (Isr.).

⁶⁴ Anne-Marie B. Hammond, *How Do You Write "Yes"? A Study on the Effectiveness of Online Dispute Resolution*, 20 CONFLICT RESOL. Q. 261, 277 (2003).

pressured and threatening and even as reducing bitterness as compared to face-to-face conflict resolution processes.⁶⁵ It seems that the distance between the two parties to the conflict assists them in remaining calm and concentrating on the substantive issues instead of engaging in power struggles.

Netocracy is also perceived as one of the advantages of ODR. This term refers to the anonymity enabled by Internet communication. The intention is to a situation in which all of the parties are valued equally in terms of status.⁶⁶ The argument is that the inherent netocracy in ODR processes (as compared to ADR processes based on face-to-face meetings) evens out the playing field in a situation where there are power gaps (in the open or hidden) and is likely to contribute to a real “win-win” agreement in which both parties are truly satisfied.⁶⁷ One of the arguments made in this context is as follows:

While a submissive party will generally make concessions offline so as to avoid confrontation with the dominant party, online, with the Internet providing a safe distance barrier, a once submissive party feels a sense of empowerment and will communicate directly, more assertively, and be less likely to make concessions.⁶⁸

Since B2C Internet disputes are disputes that by their very nature have the characteristic of a strong party (the seller) against a weak party (the consumer, as explained above),⁶⁹ the advantage of the netocracy has particular importance in such cases.

One of the key advantages of the online process is that it is based on **asynchronous** (non-simultaneous) **communication**. It transpires that such communication contributes to organizing one's feelings and controlling them as well as presenting them to the other party in an intelligent fashion after the exercise of discretion.⁷⁰ Hammond's studies demonstrate that asynchronous communication even contributes to the mediator's ability to work effectively.⁷¹

⁶⁵ *Id.*

⁶⁶ Robert Gordon, *The Electronic Personality and Digital Self*, 56 DISP. RESOL J. 8, 13 (2001).

⁶⁷ *Id.* at 14. See also Brennan, *supra* note 35, at 217.

⁶⁸ Abraham Kuhl, *Family Law in the Twenty-First Century: Comment: Family Law Online: The Impact of the Internet*, 21 J. AM. ACAD. MATRIMONIAL L. 225, 242 (2008).

⁶⁹ See *supra* Chapter II. A.

⁷⁰ Brennan, *supra* note 35, at 218.

⁷¹ In Hammond's study, all of the mediators agreed that the online communication contributed to their ability to concentrate on the overall picture instead of

A further characteristic of the communications in ODR is the fact that it is based on **written (textual) communications**. This kind of communication has a number of inherent advantages: first, it slows the pace of response, in comparison to oral responses, as well as reflecting visually to the writer the message contained in his words. In this manner, it opens the door to concentrating on the substance of what is stated and it acts as a barrier to the instinctive outburst.⁷² Additionally, this communication forces the one transmitting the message to be precise and clear. In this kind of communications (as distinguished from in person communications) it is not sufficient to convey hints or interim comments.⁷³

A further advantage of such communication is the advantage of **archival preservation**. In the traditional process, the emphasis is on confidentiality and on the idea that *nothing is kept*. In online dispute resolution, everything is kept. The digital follow-up of written texts and the fact that they are automatically saved creates a record for the entire exchange of communications, the disputes and agreements, without the need to invest special efforts. All of these are likely to assist the neutral third party in nudging the parties towards an agreement more effectively.

Johnson summarizes the advantages of ODR, particularly in B2C Internet disputes, as follows: "ODR diminishes consumer risk while simultaneously augmenting consumer trust and confidence by making adequate redress possible. In the transnational consumer context, ODR's transparency, efficacy, and simplicity maximize ADR's benefits in unprecedented ways."⁷⁴

In spite of its advantages, ODR is not free from **criticism**:

First, written communications have their own **disadvantages**.

concentrating on the interactions between the parties at any given moment. Hammond, *supra* note 64, at 275. All of the mediators agreed that asynchronous communication gave them time to respond, which they used to skillfully word their responses and questions to the parties. *Id.* Most of the mediators reported the added value in being able to follow the changes in the documented interaction and to use the time until sending a response to consult with others prior to reaching a decision. *Id.*

⁷² Martin Gramatikov & Laura Klamming, *Getting Divorced Online: Procedural and Outcome Justice in Online Divorce*, 14 J. L. & FAM. STUD. 97, 100 (2012).

⁷³ Colin Rule, *New Mediator Capabilities in Online Dispute Resolution*, MEDIATE (Dec. 2000), <http://www.mediate.com/articles/rule.cfm> [<https://perma.cc/YST4-VELG>].

⁷⁴ Johnson, *supra* note 5, at 582.

The assertion is that written communications are always “thin,” laconic and lacking in comparison to in-person communications, which are perceived as richer and more interactive communications between people.⁷⁵ Written communications lacks the non-verbal hints such as facial expressions, gestures, and tone of voice.⁷⁶ Additionally, the assertion is that the conversation, in which facial expressions, gestures and other hints found in body language are absent, is likely to give rise to misunderstandings in the best case,⁷⁷ and the filling of lacunae with doubts, suspicions and fears in the worst case.⁷⁸ It seems, in spite of this, that in B2C Internet disputes this point is less problematic, in comparison to disputes that are emotionally charged such as domestic disputes or other disputes involving long-term relationships.⁷⁹

The scholarly literature notes a further failing in the existing ODR mechanisms, i.e., their limited power.⁸⁰ The current situation is that most of these processes are non-binding or can be implemented only if the client gives prior consent to using the merchant’s ODR provider and process in the case of a future dispute. Additionally, post-dispute agreements to use ODR are very rare in practice, in view of the parties’ concerns regarding the online information se-

⁷⁵ Brennan, *supra* note 35, at 222. See also Gillieron, *supra* note 15, at 327–28 (“If ODR wants to be successful, users of such systems must have trust in this environment. This is probably the biggest and toughest issue ODR designers have to work on. Consumers have developed particular skills to trust or distrust their sellers in the offline environment; they can see their sellers in person, walk around the shop and, in case of any problem, go back to the physical shop. Such clues are inexistent in cyberspace. Consumers are not used to this new environment and the analytical skills they developed over time in the real world do not work any longer online. In other words, consumers feel lost and, consequently, lack confidence.”).

⁷⁶ Bruce Leonard Beal, *Online Mediation: Has Its Time Come?*, 15 OHIO ST. J. ON DISP. RESOL. 735, 737 (2000).

⁷⁷ Gramatikov and Klaming, *supra* note 72, at 100.

⁷⁸ Brennan, *supra* note 35, at 222.

⁷⁹ See Dafna Lavi, ‘Till Death Do Us Part?!’ — *Online Mediation (e-Mediation) as an Answer to Divorce Cases Involving Violence*, 16(2) N. C. J. L. & TECH. 253, 278–84 (2015) (“The Internet is changing the way divorce mediation is practiced in the USA and is becoming an integral part of effective and affordable divorce mediation services and programs. When it began, e-Mediation provided solutions to disputes that arose on the Internet such as disputes over electronic commerce. However, over the years, it has become more widespread and parties have applied it to disputes that did not originate in virtual space . . .”).

⁸⁰ Amy J. Schmitz, “Drive-Thru” Arbitration in the Digital Age: Empowering Consumers Through Binding ODR, 62 BAYLOR L. REV. 178, 182 (2010).

curity, technological reliability, award enforcement and process regulation.⁸¹

Beyond these disadvantages, common to all of the ODR mechanisms, there are unique disadvantages (as well as unique advantages) distinguishing between the various mechanisms. In the following sections of this chapter we will discuss two of the more common apparatuses — online mediation and online arbitration.

3.2. Online Mediation

The volitional nature of the mediation process, including online mediation and the parties' autonomy, are the outstanding characteristics of the process, as noted above.⁸² These characteristics are perceived **as the outstanding advantages** of online mediation, particularly in B2C Internet disputes.

First, the assertion is that the process enhances the parties' autonomy and promises them greater control over the process and its results, increases the probability of arriving at a result based on true agreement between the parties that gives expression to their true and most important interests.⁸³ Such a result is also more effective, because an agreement arrived at out of 'true' free will is more likely to be honored than where the agreement is not arrived at in this manner, for two reasons:⁸⁴ The first reason is that when the parties fashion the outcome of the process for themselves, through negotiations that deal with their interests rather than their formal legal rights, the chances are increased that the agreement will in the end result in a win-win solution. This is likely to contribute to the satisfaction of the parties with the outcome and as a result, to implementation of the agreement by the parties.⁸⁵ The second reason is that empirical studies prove that the parties to mediation are more likely to feel committed to the mediation agreement than to an imposed judgment, due to the fact that they arrived at the agreement jointly.⁸⁶

⁸¹ *Id.*

⁸² See *supra* note 39 (specifying that mediation relies first and foremost on the idea of personal autonomy and the self-determination of the parties).

⁸³ Haloush & Malkawi, *supra* note 3, at 335–36.

⁸⁴ Haloush, *supra* note 9, at 76.

⁸⁵ *Id.* at 75–76.

⁸⁶ Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 261 (1981).

Moreover, various studies point to the fact that the parties' satisfaction or dissatisfaction from the legal services they receive correlates to the *manner* in which the process is carried out not less than to its *outcome*.⁸⁷ It seems that a party will be more amenable to coming to terms with unfavorable outcomes for him if he believes that they occurred at the end of a process that was carried out fairly, in which he had a real opportunity to present his case and to affect the outcome.⁸⁸ In short, it can be stated that where the parties adopt a solution voluntarily, they are more likely to honor it and therefore the solution is **effective**.⁸⁹

Second, arriving at an effective outcome, which increases the parties' satisfaction with the process and its outcome, is perhaps the most important goal of the ODR mechanism and it is certainly the main way to ensure a stable and reliable market with respect to B2C international transactions in the virtual arena that will include repeat players with deep trust in the system. As Haloush notes:

The idea of enhancing the role of participants in dispute resolution in cyberspace is particularly true in certain online settings that focus on creating communities of buyers and sellers, such as auction web sites. In auctions web sites, where buyers and sellers are strangers to each other with uncertain identities or reputations, and where online auction sites assume no responsibility for any problems that may arise between buyers and sellers, which result in a high risk environment in the extreme, mediation may create a more real level of trust. In actual fact, as much as mediation can provide a platform to reach a mutually acceptable outcome by the parties in an auction web site, it can guarantee the auction web site users to keep on using the web site in the future.⁹⁰

⁸⁷ Tom R. Tyler, *The Psychology of Disputant Concern in Mediation*, NEGOTIATION J. 367 (1987) (citing Laurens Walker, Allen Lind, & John Thibaut, *The Relation Between Procedural and Distributive Justice*, 65 VA. L. REV. 1401, 1412-14 (1979)).

⁸⁸ Edward Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should be Required?*, SMU L. REV. 2079, 2087 (1993).

⁸⁹ Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 U.C.L.A. L. REV. 485, 502 (1985) (citing Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 261 (1981)).

⁹⁰ Haloush, *supra* note 9, at 76.

Therefore, and in view of what has been stated, due to the emphasis that it places on the parties' autonomy and due to the positive outcomes of this autonomy on the international e-commerce market, it seems that online mediation is likely to make a significant contribution to the future development of such commerce.

It bears noting that, with the encouragement of the sphere of action of the parties in managing the process and fashioning its outcomes (as compared to other ADR mechanisms), the mediation process can be easily integrated into the cyberspace environment "with its decentralized and technical nature as a network of the networks."⁹¹ As Post (one of the outstanding writers on the subject of cyberspace) notes, "our very conception of what constitutes justice in the online context could be based on an emerging non-coerced individual choice."⁹²

There are, however, a number of **challenges or concerns** with respect to online mediation that cannot be ignored:

3.2.1. *The Disadvantages of the Parties' Autonomy*

In spite of the breadth and importance of the parties' autonomy in the mediation process and as detailed above, it is not free of criticism. The scholarly literature points to its limitations and weaknesses in certain categories of cases. One of them is the category of large power gaps between the parties. This category is relevant for us in view of the inherent power gaps between the consumer and the seller in B2C Internet disputes, which, as detailed above,⁹³ are perceived by some of the scholars as problematic in terms of its suitability to the mediation process.⁹⁴ The assertion is that, especially in a process that puts the parties at the center and gives them a platform, and where, as is generally the case in B2C Internet disputes, they are not necessarily represented by legal counsel, limitations or relative limitations of the parties manifest as compromised abilities of self-expression, lack of legal knowledge, status, weakness (stemming inherently from the relationship with the other party), etc.

⁹¹ Haloush & Malkawi, *supra* note 3, at 337.

⁹² *Id.*

⁹³ See *infra*, Chapter II A (stating that Internet purchasers are often not protected in their transactions because they are unfamiliar of the national laws of the country they are purchasing from).

⁹⁴ Dafna Lavi, *Divorce Involving Domestic Violence: Is Med-Arb Likely to be the Solution?*, 14 PEPP. DISP. RESOL. L. J. 101-61 (2014).

Moreover, the limitations of the weaker party are expressed even more in an informal negotiation process of 'private justice' (as distinguished from a formal judicial process), because he is more vulnerable to manipulations by the other party.⁹⁵ Again, online mediation in B2C Internet disputes constitutes a classic example of this kind of justice.

Moreover, the mediator, who is supposed to function as a neutral third party, is very limited in his ability to assist the weaker side or to come to his defense. Any such assistance is likely to be interpreted as taking sides, breach of neutrality and hence exceeding the boundaries of the role,⁹⁶ especially in a process that enhances the parties' autonomy and for this purpose sets boundaries on the mediator's authority. The assertion is that the mediator cannot hold onto his neutrality on the one hand and properly deal with power gaps between the parties on the other hand. In honoring his duty of neutrality, the mediator, including the online mediator, will invol-

⁹⁵ As well as by the mediator. See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L. J. 1545, 1560, 1568 (1991) where Grillo notes that "the informal law" of mediation means that the deliberations involving principles, guilt and rights, as occurs in an adversarial process, are likely to be considered irrelevant and even disruptive. The mediator imposes informal sanctions in order to get the parties to replace the rhetoric of guilt, rights and values with the rhetoric of compromise and relationships. For example, a mediator will direct the parties to rationalization and compromise and will distract them from engaging in moral justifications. The harm to women is in the fact that the thinking takes place in "masculine language" (preference for rationalization, pragmatism, purposefulness and commercial division as opposed to morality, guilt, responsibility and feeling) and because conflicts are related to as a subjective interpersonal quarrel with no objective right or wrong but rather different points of view (masculine versus feminine). However, in fact, there is, at times, an objective truth that the law recognizes as granting rights and advantages to women.

⁹⁶ In the framework of his position, the mediator must serve as a **neutral** and independent third party who does not take a position in favor of one party or the other, does not express identification with either party, does not make accusations against either party and does not *represent* either of the parties in the course of the mediation. The mediator's neutrality is a central and important characteristic of his position and one of the keys to his success in the process. It enables building each of the party's confidence in him and, as a result, the party's willingness to expose his real interests, desires and weaknesses. It is possible to define this as one of the fundamental principles of the mediation process, going to the root of the substance of the role of the mediator. See, Karen A. Zerhusen, *Reflections on the Role of the Neutral Lawyer: The Lawyer as Mediator*, 81 KY. L. J. 1165, 1169-70 (1992-1993) (explaining that mediator impartiality is requisite in all aspects of the mediation process).

untarily contribute to perpetuating the power gaps between the consumer and the seller.⁹⁷

This criticism of mediation becomes even sharper in view of the fact that in the framework of the autonomy of the parties to a mediation process, they are not subject to substantive or procedural law, as explained above.⁹⁸ In spite of the fact that online mediation for the most part can be characterized as 'mediation in the shadow of the law,' it is still influenced more by negotiations between the parties (who do not have equal power in these types of disputes) and lacks the inherent protections of the legal system (in the form of local consumer protection laws, etc.) that carries with it assurances of justice and due process.⁹⁹

Additionally, it must be remembered that in spite of the fact that some providers of ODR try to encourage the defendant party to respond to complaints and to participate in the mediation process, there is no guarantee that it will agree to do so, insofar as the very participation in the mediation process is voluntary.¹⁰⁰ Precisely for this reason, the WIPO Final Report on the Management of Internet Domain Names and Addresses recommended not adopting a voluntary process such as mediation into a dispute resolution policy for

⁹⁷ Kerry Loomis, *Domestic Violence and Mediation: A Tragic Combination for Victims in California Family Court*, 35 CAL. W. L. REV. 355, 362-63 (1999) ("Second, the goal of a mediator is to reach an agreement while remaining impartial and neutral, and therefore, he is unable to significantly counteract the imbalance of power.").

⁹⁸ See *supra* note 39 and the accompanying text.

⁹⁹ One of the known opponents to the mediation process in the American literature is Owen Fiss. See generally Owen M. Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1984). According to Elberstein, Fiss' argument is as follows:

[M]ediation is not suitable for situations of power gaps between the parties . . . even if we assume that power gaps are also present in judicial proceedings, the tendency of judicial proceedings is to fight against them and to balance them, whereas mediation assumes that they are an integral part of the negotiation situation. This concern is connected to the apprehension that support of mediation as a dominant process will delay the development of protection of weak groups through precedential decisions . . . The concern is that while the law looks from above and tries to contribute to comprehensive social and distributive justice, mediation will operate from below, with an unbalanced emphasis on effectiveness and will harm the broader social processes that the Supreme Court wished to promote, while preserving the status quo.

Michal Elberstein, *Opposition to Mediation: Rights, Legal Consciousness and Multi Culturalism*, 24 MEHKAREI MISHPAT 373, 385-87 (2008) [Hebrew].

¹⁰⁰ Haloush & Malkawi, *supra* note 3, at 336.

domain name disputes.¹⁰¹

Moreover, it is argued that the voluntary nature of the process and the fact that a party cannot be required to participate in it increases the risk of exploitation of the process by unscrupulous entities. This is all the more obvious in the context of dispute resolution in the Internet environment, an environment enabling fraud or exploitation with great ease due to physical distance.¹⁰²

3.2.2. *Absence of Finality*

Other criticism of online mediation notes the fact that the process does not end with a coerced judgment rendered by the mediator, but rather with an agreement, as well as the fact that the parties are entitled to leave the process at any time. These two features lead to the situation in which, in effect, neither party is bound to arrive at an agreement in the process, which is likely to lessen its attractiveness for the parties. The parties are likely to be apprehensive about investing time and energy in a process that has no finality.¹⁰³ Moreover, while in offline mediation it is often the case that local legislation exists enabling a process of certification of the mediation agreement by the court (a process that gives it binding force equivalent to that of a judgment), in online mediation that tries, albeit in the name of efficiency, to *escape* the need to use the courts, the situation is more problematic. Thus, it transpires that the absence of a binding judgment at the end of the mediation process constitutes one of the most obvious disadvantages of the online process and is likely to lead to non-use of the process due to the desire of the parties to avoid wasting time on a process as to which neither the participation in it nor its outcome is enforceable.

3.2.3. *Costs of the Process*

The argument is that in disputes of this nature, the cost of the process is a significant consideration in the eyes of the consumer, in view of the fact that at issue are transactions of a low monetary value. Thus, any online mediation that is not free will not be highly attractive.¹⁰⁴

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* See also *infra*, the discussion of online arbitration, which does provide finality in the guise of the arbitral award that ends the process.

¹⁰⁴ *Id.*

3.2.4. Unattractiveness Due to the Low Rate of Reaching Agreements

Despite the impressive array of technological methods at the disposal of online mediation, there has been limited use of or success with online mediation in dealing with consumer disputes.¹⁰⁵

The low rate of obtaining agreements in e-commerce disputes at the end of an online mediation process does not add to its attractiveness.¹⁰⁶ In spite of the fact that providers of various ODR services provide the online mediation service for free, there is still opposition among consumers to using this process.¹⁰⁷

This section can be summarized with the words of Ponte, according to which "the use of online facilitative mediation to resolve online consumer disputes will require a great deal more research . . . before its true benefits and limitations can be assessed."¹⁰⁸

This article seeks, therefore, to contribute another layer in the development of this research. In spite of the alleged disadvantages of online mediation, as discussed above, it is the premise of this article that they can be dealt with. In chapter IV, *infra*, an online med-arb process will be proposed as a means to deal with these disadvantages.

3.3. Online Arbitration

In comparison to traditional, offline arbitration, online arbitration has a number of **advantages**;¹⁰⁹ first, it is faster. Second it is much more cost-effective. Third, it is accessible and available 24 hours a day. Fourth, it offers a process handled in the most effective manner, fifth, it is also appropriate for disputes with a low monetary value, such as the B2C Internet disputes that are the subject of this article and sixth, it provides protection to consumers by giving them access to remedies.¹¹⁰

Various scholars point to the advantages of online arbitration

¹⁰⁵ Ponte, *supra* note 38, at 78 ("Despite a great deal of online interest in InternetNeutral, no dispute has advanced to an actual online mediation.").

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 79.

¹⁰⁹ Wahab, *supra* note 56, at 403.

¹¹⁰ Schmitz, *supra* note 80, at 212.

even in comparison to other forms of ODR, particularly for the purposes of B2C Internet disputes.¹¹¹ One of the arguments is that online arbitration is likely to contribute to increasing consumer satisfaction and giving him fast access to a real remedy since this process ends with a final third-party determination, as distinguished from online mediation.¹¹² As Schmitz notes, "OArb [Online Arbitration] also has more potential than other ODR processes to satisfy consumers with substantive answers on their claims' merits and quick access to remedies because it culminates in a final third-party determination."¹¹³

Another advantage of online arbitration relates to the fact that the disadvantage of the absence of face-to-face interactions (and the concern regarding *thinner* communications in the process as a result, as discussed above),¹¹⁴ is lessened when talking about online arbitration as compared, again, to online mediation. As distinguished from mediation, arbitration does not set for itself the objective of improving communications between the parties. The communications in arbitration are much less complex and are likely to rely solely on the exchange of pleadings, evidence and other written stages, with the oral argument holding much less weight. In a process such as online arbitration, which relies less on the interaction between the parties and more on evidentiary submissions, the disadvantage of *thin* communications is less significant.¹¹⁵

A further alleged advantage of online arbitration is that it is likely to rely upon "forms and automated systems that address an imbalance of resources and skills by assisting parties in presenting their cases in an efficient and effective manner."¹¹⁶

Indeed, in the United States, the legislature and the court have recognized the advantages, alongside the potential, of online arbitration for the consumer in a B2C Internet dispute and have related to this, both directly and indirectly, in their legislation and judicial

¹¹¹ Schmitz, *supra* note 80, at 183 ("OArb deserves attention as a means for effectively and efficiently resolving consumers' disputes with online merchants. As with other ODR, it allows for fast, flexible, convenient, and often more comfortable scheduling and communications") (citing David A. Hoffman, *The Future of ADR: Professionalism, Spirituality, and the Internet*, 14 DISP. RESOL. MAG. 6 (2008)).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See *supra*, note 75 and accompanying text.

¹¹⁵ Schmitz, *supra* note 80, at 184.

¹¹⁶ *Id.* at 221.

decisions, respectively. For example, the combination of the Federal Arbitration Act ("FAA") with the Electronic Signature Act ("Esign") has made electronic contracts (such as the online arbitration agreement) enforceable in exactly the same way as paper contracts.¹¹⁷ The declared objective of this legislation was to improve and advance the development of electronic commerce, by, among other means, validating the use and legal enforceability of e-signatures. Additionally, the FAA and its state counterpart, the Uniform Arbitration Act ("UAA") direct the courts to enforce arbitration agreements, regardless of whether they were signed before the dispute broke out or afterwards (pre and post-dispute arbitration agreements).¹¹⁸

However, and as is clear from the scholarly literature, alongside its advantages, online arbitration presents a number of challenges and concerns. They can be divided into two main layers: the **legal** layer and the **technical** layer.

With respect to the **legal** layer, the following concerns may be enumerated:

3.3.1. Problems Stemming from a Process Based on a Discussion of Rights and Laws

Because the online arbitration process, as distinguished from online mediation, is based on a discussion of rights and laws, questions of choice of law and jurisdiction are likely to arise frequently in the context of international B2C Internet disputes since it is often difficult to determine where the contract was formed in the virtual

¹¹⁷ Electronic Signature legislation has found support not only in the United States, but in China as well. Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 (2000); Dianzi Qianming Fa (电子签名法) [Electronic Signature Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2004, effective April 1, 2005) 2004 Standing Comm. Nat'l People's Cong. Gaz. 449 (China) (In English at <http://tradeinservices.mofcom.gov.cn/en/b/2007-11-29/13694.shtml> [<https://perma.cc/C798-A4NW>]).

¹¹⁸ Schmitz, *supra* note 80, at 184:

These laws also boosts arbitration enforcement with liberal venue, immediate appeal from orders adverse to arbitration, appointment of arbitrators in the absence of agreement, limited review of arbitration awards, and treatment of awards as final judgments. Furthermore, the Supreme Court has read the FAA to preempt states from hindering the enforcement of arbitration in contracts affecting interstate commerce, thereby limiting state regulation of arbitration to general common law contract defenses.

realm, and such questions are likely to give rise to a number of problems.¹¹⁹ It is similarly difficult, at times, to establish the place of arbitration, which may be required for purposes of enforcement of the arbitral award or the arbitrator's decision or the law according to which the arbitrator will decide when he is ready to make his decision. These problems may be solved through "delocalized 'law,' incorporating general contract principles and e-commerce norms."¹²⁰ An all-encompassing, international and enforceable regulatory framework such as this still does not exist; however, the parties are likely to agree in advance and in the framework of the med-arb process (as shall be proposed *infra* in Chapter IV) on questions such as choice of law, place of judicial jurisdiction, the place where the arbitration takes place and the law binding the arbitrator in his decision. Such an agreement is likely to resolve most of the disadvantages of the process, as noted above.

3.3.2. *Enforceability and Recognition*

An obvious problem with online arbitration is the **problem of enforcement and recognition**. This problem is likely to arise both in the context of the arbitration agreement and in that of the arbitral award rendered at the end of the process. The existing arbitration legislation in the world, dealing, for the most part, with offline arbitration, is lagging well behind the rapid developments on the ground in online arbitration.¹²¹ To date, many of the arbitration laws throughout the world do not relate to online arbitration.¹²² For example, in the international arena, a number of concerns were raised regarding the validity of both the arbitration agreement and of the arbitral award, especially regarding meeting the requirements, such as the "writing" requirement, of the NYC.¹²³ It may be assumed that the NYC was adopted "at a time when the drafters could not foresee that [both arbitration agreements and arbitral awards] could take

¹¹⁹ *Id.* at 211.

¹²⁰ *Id.*

¹²¹ Wahab, *supra* note 56, at 403.

¹²² *Id.*

¹²³ Betancourt & Zlatanska, *supra* note 20, at 262. Regarding the "writing requirement," see Wahab, *supra* note 56, at 404 ("[T]he prevailing principle in arbitration law and practice is that an arbitration agreement needs to be agreed in 'writing.' National laws differ with respect to the characterization of such requirement. Whilst some laws consider 'writing' a formality, others consider 'writing' for evidentiary purposes.").

other than a physical form.”¹²⁴ In spite of this, as stated, there are organizations operating throughout the world that are trying, through domestic organizational legislation or the enactment of model laws, to speed up online processes and address specific requirements which, as in the example of the “writing requirement,” are defective by way of omission in these online processes.¹²⁵ Thus, it may be assumed that, with time, courts throughout the world will indeed recognize that the online arbitration agreement and the online arbitral award meet the formal requirements of the NYC. However, there are still “no universally accepted rules currently governing on line [arbitration] procedures.”¹²⁶

Thus, the absence of a universal legally sufficient model or all-purpose arbitration clause leaves the various problems of enforcement of online arbitration in place.¹²⁷

It bears noting that the problem of enforcement is particularly acute in a certain kind of agreement which is very common of late in B2C Internet transactions, i.e., pre-dispute arbitration agreements between Internet sites and their users, sometimes termed *click-wrap agreements*. In agreements of this kind, prior to the use of a sales site and as a condition for its use, the user signs on his consent and undertaking to use online arbitration in the event of a dispute between him and the site, through clicking on the box “I accept” or “I agree.”¹²⁸ It is noted that due to the fact that this kind of agreement provides maximum speed and convenience both to the seller and to the consumer, it is indeed recognized by various legislatures in the world as valid and enforceable.¹²⁹ For example, in the United States, in view of the existing legislation, these clauses are recognized as enforceable.¹³⁰ The only reservation is in the case in which it transpires that they are procedurally unconscionable or substantially

¹²⁴ *Id.* at 262 (citing UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, DISPUTE SETTLEMENT: INTERNATIONAL COMMERCIAL ARBITRATION, ELECTRONIC ARBITRATION 3–55 (2003)).

¹²⁵ Wahab, *supra* note 56, at 404, 406. See also Schmitz, *supra* note 80, at 210 (noting that courts now routinely enforce e-contracts).

¹²⁶ JULIAN D. M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 48 (2003).

¹²⁷ Schmitz, *supra* note 80, at 207–08.

¹²⁸ Johnson, *supra* note 5, at 579.

¹²⁹ *Id.* at 580.

¹³⁰ See *supra* note 117 and accompanying text.

unconscionable.¹³¹ With respect to international B2C Internet disputes, they are certainly likely to be considered effective and enforceable in accordance with federal law in the United States,¹³² provided that the consumer expressed his consent to use such means of electronic commerce prior to signing electronically or entering into the sales contract.

Nonetheless, a criticism of this kind of agreement argues that such an agreement, which is drafted unilaterally by the site while giving clear preference to the drafting party and includes uniform terms in an adhesion contract that are not subject to changes or negotiations, does not express, in most cases, the genuine consent of the signer.¹³³ Especially in the case of commercial e-contracts, the argument is that this *consent*, on the part of the consumer, is in effect the result of extenuating circumstances, e.g., his desire to use the sales site that is available on a take-it or leave-it basis. Similarly, the argument is that this is a routine consent (which is very common on the Internet), as to which the click is often carried out without the contract being read in advance by the user.¹³⁴ The bottom line is that the concern is that such consumer *consent* is likely to give rise to illusory consent or settlement.¹³⁵

It bears emphasis that this criticism is all the more pertinent to the background of the comparison between online arbitration and online mediation. In comparison to the mediation process, which, as discussed above, places at the forefront the autonomy of the parties and the voluntary nature of the process,¹³⁶ the arbitration process has a rather coercive character that erodes this autonomy almost completely. This begins with the fact that the parties agree to bind themselves by the arbitral award, and continues through the fact that they are not entitled to leave the process at any time (as opposed to mediation), and so on. It may be stated that the **only aspect in which the parties' autonomy is expressed in the arbitration process is that of the arbitration agreement**, i.e., the parties' consent to use this process in case a dispute arises between them. To

¹³¹ Wahab, *supra* note 56, at 409.

¹³² Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001–7006 (2000).

¹³³ Johnson, *supra* note 5, at 578.

¹³⁴ *Id.* at 579.

¹³⁵ Schmitz, *supra* note 80, at 208.

¹³⁶ See *supra* note 39 and accompanying text (providing examples of U.S. laws).

the extent that this consent is also eroded or dispensed with through click-wrap agreements, as the criticism cited above alleges, **what will remain of the parties' autonomy in the process?!**

Moreover, the problem of the infringement (or the alleged infringement) of the parties' autonomy becomes even more serious when dealing with B2C Internet disputes. In such disputes, in which, as discussed above,¹³⁷ power gaps are built into the relations between the parties, the informed consent of the consumer is highly doubtful. As Wahab notes, "e-arbitration in B2C disputes may be quite challenging due to the inherent power between consumers and businesses, which casts doubts on consumers' informed consent."¹³⁸

Indeed, the various arbitration laws throughout the world limit or reject arbitration in B2C disputes when the consumer is denied the opportunity to negotiate the terms of the agreement.¹³⁹ Various countries refuse to enforce pre-dispute arbitration agreements in consumer and electronic contracts.¹⁴⁰ For example, in the European Union, electronic merchants ("e-merchants") cannot require the buyer to resolve a dispute through online arbitration, although they are permitted to propose this as an option.¹⁴¹ The European Council Directive on Unfair Terms in Consumer Contracts limits any demand of online arbitration that denies the consumer his right to avail himself of legal action.¹⁴²

We can sum up and state that the entire problem of enforcement, as detailed until now, raises questions about the effectiveness of using **legal** enforcement mechanisms with respect to Internet commerce. The question is asked if it is not possible and appropriate to examine the use of more complex means, such as consent or means connected to the virtual space itself. In Chapter IV below, we will discuss these suggested means through use of the improved model advocated for online med-arb and see how this model is likely to address the problem of enforcement and recognition as discussed herein.

¹³⁷ See *supra* Section II. A.

¹³⁸ Wahab, *supra* note 56, at 408.

¹³⁹ *Id.*

¹⁴⁰ Schmitz, *supra* note 80, at 211.

¹⁴¹ *Id.*

¹⁴² *Id.*

3.3.3. *The Absence of a Uniform and Universal Binding Regulatory Scheme*

As we have seen above, the fact that there is **no uniform regulatory scheme governing** the arbitrability of consumer disputes has a negative effect on various aspects of disputes of this nature.¹⁴³ In particular, the fact that the 1958 New York and 1961 European Conventions do not provide guidance on the subject (and thereby, in effect, transfer the subject to the province of national laws)¹⁴⁴ creates various problems. As a result of the fact that various national laws grant different levels of protection to the consumer in disputes of this nature, a great deal of legal uncertainty is created from which all the parties to the transaction suffer. In addition, the very differentiation between the various legislative enactments and the fact that such legislation is generally territorially limited, are inconsistent with the multi-jurisdictional and *borderless* character of cyberspace.¹⁴⁵

Other than the legal layer, as stated, online arbitration also raises a number of concerns in the **technical** layer. As Wahab has stated: "The technical concerns necessarily pertain to technical standards and compatibility of systems, variation in the parties' technical abilities and expertise, security and confidentiality of arbitral proceedings and communications, ability to organize and conduct hearings online, and data integrity and authentication."¹⁴⁶ It bears emphasis that, in spite of the fact that these concerns are not unique to online arbitration but apply to all online ODR processes, they are raised particularly clearly in online arbitration, which is of a legal and adjudicatory nature, is subject to strict procedures and norms to ensure the fairness of the process, and ends with a binding judgment. For example, if the relevant arguments of the parties to the dispute, as well as their evidence, cannot be submitted through the appropriate

¹⁴³ For example, in the area of recognition and enforcement (or non-recognition and non-enforcement) of legislation throughout the world relating to click-wrap agreements.

¹⁴⁴ Wahab, *supra* note 56, at 403.

¹⁴⁵ RAFAL MOREK, REGULATION OF ONLINE DISPUTE RESOLUTION: BETWEEN LAW AND TECHNOLOGY 64 (2005).

¹⁴⁶ Wahab, *supra* note 56, at 403.

means, the risk of compromising the fairness of the process increases.¹⁴⁷ It must be remembered that private justice is at issue in arbitration. In online arbitration the intent is to the process, which is generally carried out by private service providers, who are not under government supervision and are not subject to strict and binding international legislation. Moreover, the extent of the training or professionalism of these service providers is not always clear. Therefore, questions such as the fairness of the process or the level of protection that it provides to the consumer who participates in it are critical. This is especially the case in view of the fact that at issue is a process in which the level of the parties' autonomy is very limited, it is not possible to leave at any stage and the end is a coercive and binding judgment. Among the most prominent problems connected to the technical layer, the following can be enumerated: *confidentiality and privacy of data, trust, concern regarding the compromise of due process due to technological power gaps and cost.*

3.3.3.1. Confidentiality and Privacy of Data

One of the best examples of technical concern is the subject of **confidentiality and privacy of data** transmitted through online communications and the need for security. Computers may crash, hackers improve their ability to enter databases all the time, and viruses are also likely to harm digital processes and files. It is clear that e-mails that are not protected and web-based communications are more vulnerable than communications through the exchange of paper documents. Even if providers of ODR declare that they treat information in accordance with the obligation of confidentiality, as is required in electronic dispute resolution processes, it does not mean that information cannot accidentally leak out or that third parties do not have access to it.¹⁴⁸ Electronic communications must be protected through electronic means and access to it must be secured before the ODR process begins and even after it ends. In addition to the protection of data and communication support, the protection of data processing is important.

It bears noting that securing the communications and data is a necessary pre-condition for ODR, particularly online arbitration, for two main reasons. The first reason is that, as distinguished from

¹⁴⁷ Haloush & Malkawi, *supra* note 3, at 342.

¹⁴⁸ Schultz, *supra* note 2, at 6-7.

online mediation, the online arbitration process includes, in many cases, the submission of evidentiary material. In many cases, documents that are submitted electronically between the seller and the buyer constitute the only evidence of the conclusion and performance of the contract. If such a document is forged, it should not be admissible as evidence in the online dispute resolution process.¹⁴⁹ For example, when the question of the very existence of the online sales contract or its terms is disputed, one of the parties will have to prove its existence and its content through the reception of the offer or the acceptance by the addressee. In the absence of security measures against forgery, one of the parties can assert that the relevant document transmitted through e-mail was forged or that an Internet page including the information regarding the terms of the transaction was changed after the transaction was signed off on.¹⁵⁰

The second reason is trust. As part of the increase in trust of the end-user in the online process, they must be confident that the mechanism necessary for protecting data is indeed in use. The greater the parties' confidence in the process and its means of security and protection of their privacy, the greater their willingness to be open and candid and to cooperate with the third party in the attempt to resolve the dispute.

3.3.3.2. *Trust*

The problem of trust does not relate solely to the technical layer, although the solution, as suggested in chapter IV,¹⁵¹ is likely to be through use of technical means. Generally, and as is natural, the issue of trust is more sensitive in the online process in comparison to an ADR process that is carried out face-to-face. In the real world, outside of the net, those using an ADR process generally have, as a matter of course, a stronger sense of trust and confidence in the neutral provider of the service, who they see in front of them, and often even know. This acquaintance and actually seeing the person usually creates a sense of confidence, trust and stability, as opposed to the virtual world, in which ODR providers are not seen and many of the provider sites come and go constantly.

Moreover, among the ODR processes, the issue of trust is particularly critical in the online arbitration process, in which, as stated,

¹⁴⁹ *Id.*

¹⁵⁰ Schultz, *supra* note 2, at 10.

¹⁵¹ See *infra* Chapter IV.C.

the volitional aspect is very limited and which, as stated, ends with a coerced judgment, as opposed to online mediation. In a coercive process such as this, trust in the neutral party who renders the judgment is critical. Additionally, the fact that there are no universal and binding licensing or registration requirements regarding providers of ODR services is also likely to erode this trust. This is also the case regarding the absence of universal and binding legislation with respect to the requirements of security or training of the service providers. All of these things leave the end users exposed to the danger of unprofessional or inappropriate service, which is likely, of course, to erode their trust in advance.¹⁵²

With respect specifically to B2C Internet disputes, the problem of trust also affects the concern of many consumers that providers of ODR services will be biased in favor of the e-merchants, who offer the services of ODR providers on their sites. There are those who fear that in-house programs give preference to the company providing them and that outside administrators prefer the seller, upon whom they depend for the promotion of their business.¹⁵³

3.3.3.3. Concern Regarding the Compromise of Due Process Due to Technological Power Gaps

The concern regarding the compromise of due process due to large technological power gaps between the parties to a dispute in online arbitration is also connected to concerns belonging to the technical layer. The basic requirement of due process relies, inter alia, on the parties' ability, including their technological ability, to present their arguments and submit their evidence on an equal footing. This is particularly critical in a process that ends with a coercive and binding judgment, relying, as a matter of course, on such arguments and evidence. The problem is that in many cases there is likely to be a large power gap between the parties with respect to technological means and skills, which is likely to affect the way in which arguments are presented and evidence is submitted in the online process.

¹⁵² Manisha Navlani, *Rethinking Online Arbitration*, SOCIAL SCIENCE RESEARCH NETWORK, Sep. 10, 2013, at 12, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2332784 [perma.cc/4MTC-6QNE] (asking because "[m]any people do not trust normal e-commerce services, how can one trust ODR, where even greater rights are at stake?").

¹⁵³ Schmitz, *supra* note 80, at 217, 225.

This problem is likely to be particularly pronounced in B2C Internet disputes. If the merchant is a large e-commerce company, then he is likely to have access to the most advanced equipment for submitting evidence and engaging in hearings online. He is also likely to have at his disposal a team of software and information technology experts who are likely to provide advice and guidance in using the online arbitration program. By contrast, consumers may not have a computer, let alone any other equipment and will have access only to such equipment as may be available to the public in a library, for example, where they may have to wait in line to use it.

Moreover, it must be remembered that access to technology (Internet services, web cameras and other technological equipment) costs money. Consumers, for the most part, have older and slower technological systems than big companies. In addition, a consumer generally does not have other advanced equipment and is forced to pay for additions such as outside computer doctors or outside technological help that can help him with Internet issues. For the most part, the simple consumer lacks the means for training or other assistance in using particular OArb systems. In most cases, he also does not have expertise, or he is not comfortable with using advanced technologies on the Internet, particularly if he is not a member of the current tech-driven generation.¹⁵⁴ Moreover, due to remote residential locations or government regulation, the consumer may be denied access to high speed Internet or other technological services needed in order to digitally submit evidence and engage in virtual hearings or other procedures of the online arbitration process.¹⁵⁵ All of these things are likely, of course, to put him in a significantly disadvantaged position in comparison to the merchant with respect to the presentation of arguments and submission of evidence in the online process, and, as a result, to greatly compromise due process.

3.3.3.4. *Cost*

Cost is, of course, a key consideration in the decision of consumers whether to start the process of submitting a complaint against merchants, particularly with respect to e-merchants, who may be

¹⁵⁴ *Id.* at 220.

¹⁵⁵ *Id.* at 219.

difficult to locate. Moreover, the consideration of the cost of submitting a complaint, with everything involved in it, as against the size of the claim, is critical when most of the B2C Internet disputes involve claims in small amounts. In spite of the fact that ODR is generally considered to be cost saving in comparison to face-to-face ADR, the issue of costs is still likely to be problematic. Online arbitration, certainly in comparison to online mediation, is not always inexpensive.¹⁵⁶ The costs also rise with the complexity of the case.¹⁵⁷ At times, the ODR apparatus is likely to be complex and to require additional training.¹⁵⁸ Consumers sometimes incur additional expenses in order to acquire appropriate technological equipment (as well as access to high speed Internet), which will assist them in submitting evidence and presenting their arguments.¹⁵⁹

In conclusion, it can be stated that online arbitration has many disadvantages. Due to these disadvantages, it is not frequently used (which constitutes a disadvantage in and of itself). Online mediation, by comparison, is more frequently used and more successful in the virtual environment. As Wahab notes:

[It] has been seen that not many e-arbitration providers exist and many have even ceased to operate. This may be due: (a) the fact that arbitration is a formal dispute resolution process that requires strict adherence to certain procedural safeguards and norms, which is not readily easy to implement online and is quite challenging depending on the technologies employed by the providers; . . . (c) the true success of e-mediation, which is a more informal and party controlled process that is not subject to procedural constraints or legal norms.¹⁶⁰

However, as we have seen in this chapter above, online mediation also has many disadvantages of its own. In view of what has been stated until now, it seems that the optimal mechanism for online alternative dispute resolution has yet to be found. This lack

¹⁵⁶ *Id.* at 223.

¹⁵⁷ *Id.* at 224.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Wahab, *supra* note 56, at 437. See also Johnson, *supra* note 5, at 582-83 ("To date, the vast majority of ODR services provide mediation, which has left online arbitration relatively undeveloped.").

is not a small matter, because it is likely to have serious repercussions for the world of Internet commerce.¹⁶¹ Therefore, and in view of all of this, in the next part we will examine a relatively new model of online med-arb, including its potential contribution to dealing with the disadvantages of the existing ODR mechanisms as enumerated above in this chapter.

4. ONLINE MED-ARB

4.1. *What is Med-Arb?*

Med-arb is the joining of two processes, mediation and arbitration. Traditional (offline) med-arb, an innovative of ADR, is gaining traction in the world as one of the more useful and appropriate models of the arbitration institution. It is a hybrid, two-stage process for dispute resolution, combining mediation with arbitration. Classic med-arb is carried out by one neutral person, who was agreed upon by all the parties to mediate between the parties to the dispute. His job extends afterwards, only if the mediation is not successful, and he will then wear the hat of an arbitrator between the parties, rendering a binding arbitration decision as to each of the issues that was not resolved in the preceding mediation process.¹⁶²

In effect, in choosing med-arb, the parties express their prior consent to try to reach a voluntary agreement in the first stage – the mediation stage – and if this does not succeed (or it is partially successful while several matters are still the subject of dispute) – to accept the decision of the med-arbitrator, which will be binding upon them to the same extent as an arbitral award. The stage of mediation happens before the arbitration stage and the two stages are clearly separate from each other.¹⁶³ The arbitration stage may be viewed as a kind of back-up for the mediation stage, in that it ensures a complete resolution of the dispute.¹⁶⁴ Indeed, there are those who call med-arb *mediation with muscle* or *mediation with a bite* since it overcomes what is considered by various scholars to be one of the central weaknesses of mediation: the mediator's lack of authorization to

¹⁶¹ See Haloush & Malkawi, *supra* note 3, at 327 (“[T]he lack of suitable dispute resolution mechanisms in cyberspace will constitute a serious obstacle to the further development of electronic commerce.”).

¹⁶² See generally John T. Blankenship, *Developing your ADR Attitude: Med-Arb, a Template for Adaptive ADR*, 42 TENN. BAR J. 28 (2006).

¹⁶³ *Id.* at 29–30.

¹⁶⁴ Haloush, *supra* note 9, at 85.

force a binding decision on the parties.¹⁶⁵ The objective of med-arb is, therefore, to combine the advantages of mediation and of arbitration in one forum. Med-arb tries to combine the consensual nature of mediation with arbitration's finality component.¹⁶⁶

Among the advantages of offline med-arb are the following:

Finality, which characterizes med-arb (as opposed to *pure* mediation), is viewed as one of the main advantages of the med-arb process. It must be remembered that the agreement that is reached by the parties, at the end of the mediation stage of the process, is binding and enforceable by law. The certainty that the dispute will end is inestimably valuable for the parties.¹⁶⁷

Efficiency is also considered to be a major advantage of the process. The fact that the med-arbitrator has a double role—mediator and arbitrator—makes the process more efficient as compared to **separate** mediation and arbitration processes, because when the mediation process ends and the transition is made to arbitration, the med-arbitrator does not have to start at the beginning and issues resolved in the mediation are no longer on the table for consideration.¹⁶⁸

Flexibility is another advantage and there are those who believe that med-arb is the most flexible of all of the existing ADR processes.¹⁶⁹ The med-arb process is considered to be flexible because it enables a transition from mediation to arbitration, back to mediation and so on. Even during the arbitration stage, the arbitrator may return to his role as mediator in order to deal with specific issues (in accordance with the med-arb model chosen jointly by the parties in advance).¹⁷⁰ Furthermore, the flexibility of the process is expressed

¹⁶⁵ I.e., the mediator's lack of *muscle*.

¹⁶⁶ See Haloush & Malkawi, *supra* note 3, at 345 (noting that med-arb combines the volitional nature and interest-based approach of mediation with the binding nature of arbitration).

¹⁶⁷ See generally Blankenship, *supra* note 162, at 34–35.

¹⁶⁸ Carlos De Vera, *Arbitration Harmony: 'Med-Arb' and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China*, 18 COLUM. J. ASIAN L. 149, 156 (2004).

¹⁶⁹ Gerald F. Phillips, *Same-Neutral Med-Arb: What Does the Future Hold?*, 60(2) DISP. RESOL. J. 24, 28 (2005).

¹⁷⁰ Blankenship, *supra* note 162, at 33. The frequency of these transitions and their timing is also a matter for the parties to choose. There are various options. As Blankenship states:

This is an interesting process in which there is an opportunity to conduct a separate mediation during an ongoing arbitration. It is possible for the

in the broad spectrum of solutions that it can offer to the parties, in that it begins with mediation.

Another advantage that the scholarly literature attributes to the med-arb process is that it serves as an **incentive to the parties to reach a settlement**.¹⁷¹ There are supporters who believe that the authority of the med-arbitrator, in effect, reduces the risk that some issues will remain open after the mediation stage of the process and as to which he will have to render a decision wearing his arbitrator's hat. In other words, the presence of the med-arbitrator and the looming threat of an arbitral decision create a huge incentive for the parties to successfully resolve their differences during the mediation stage.¹⁷² The conduct of the parties during the mediation stage is considered to be a further positive influence.

Beyond the incentive to reach an agreement, med-arb also creates **an incentive to the parties to act candidly and fairly during the mediation stage**, knowing as they do that if they fail to arrive at a settlement in the end, they will lose control of the results.¹⁷³ There are even those who argue that the potential use of direct 'force' by the med-arbitrator in the arbitration stage of the process serves as an incentive to the parties to treat the mediation stage seriously and to cooperate with the hope of making a positive impression on the med-arbitrator.¹⁷⁴

Further on in this chapter,¹⁷⁵ we will see how these advantages and others are particularly significant with respect to international B2C Internet disputes.

With respect to **the areas of applicability** of offline med-arb, until now med-arb has developed in four central arenas: employment

mediation to occur at any time during the arbitration, i.e., between the hearings, and on more than one occasion. The ability to mediate at different times, on more than one occasion or not at all, makes this med-arb format extremely flexible and creative especially if the same neutral is used throughout, though the parties are obviously free to use a separate neutral to mediate by having a mediator "on call" so to speak.

Id.

¹⁷¹ Blankenship, *supra* note 162, at 35.

¹⁷² *Id.* at 34.

¹⁷³ *Id.* at 35.

¹⁷⁴ See generally Sherry Landry, *Med-Arb: Mediation with a Bite and an Effective ADR Model*, DEFENSE COUNSEL J. 263, 265-66 (1996).

¹⁷⁵ See *infra* IV. B. 2. Online Med-Arb in B2C Internet Disputes - Getting the Benefits of All Methods.

disputes, international arbitration, disputes between corporations,¹⁷⁶ and family disputes and wills. Med-arb has met with a great deal of success in the international arena. In cross-cultural commercial disputes, an integrated two-stage method, like med-arb, which is better able to overcome cultural differences, is the preferred approach for dispute resolution.¹⁷⁷ This advantage is likely to be significant in international B2C Internet disputes, in which the parties are likely to encounter cultural differences. In addition to being better suited to deal with cultural differences, med-arb saves time and money and preserves the business and social relations that are so important in international relations.¹⁷⁸ Different countries, such as China, Germany, and Switzerland, use various forms of med-arb in international disputes. Countries such as Brazil, China, and Hong Kong have even enacted arbitration laws including sections on med-arb.¹⁷⁹ According to some scholars, in spite of the relatively slow development of the med-arb process and the narrow sectors that it serves, there are not many categories that are absolutely and automatically taboo for it. The question of whether it is appropriate or not depends on the circumstances and the parties involved in any given dispute. It is not unreasonable to assume that due to the trend of development of the ADR movement and its means, and due to the increasing tendency of the courts to refer disputes in its direction, the med-arb process is also likely to pick up speed and find its way as an effective and preferred means for dispute resolution.¹⁸⁰ It is our contention, upon which we shall elaborate below, that med-arb is likely to be *the next thing* in international B2C Internet disputes.

4.2. *The Online Model*

4.2.1. *The Substance and Practice in the Field*

Online med-arb services in B2C Internet disputes are very rare. However, a model of a kind of online med-arb in such disputes is included in a 2010 proposal by the United States to the Organization of American States ("OAS"). The proposal is for the creation of a

¹⁷⁶ Blankenship, *supra* note 162, at 32.

¹⁷⁷ De Vera, *supra* note 168, at 154.

¹⁷⁸ *Id.*

¹⁷⁹ Blankenship, *supra* note 162, at 32.

¹⁸⁰ *Id.* at 33.

regional ODR system and it focuses upon developing a framework for consumer protection including an OAS-ODR initiative for international B2C Internet disputes.¹⁸¹ The rationale behind the proposal was promoting the security of the consumer in Internet commerce through the development of a method enabling the speedy and enforceable resolution of disputes across borders, languages and different legal jurisdictions, while ensuring appropriate and effective compensation to consumers in e-commerce disputes.¹⁸²

The ODR model proposed by this initiative is composed of three stages: the first stage is comprised of mediation-type negotiations, the second stage is the arbitration stage and the third stage is the arbitral award. In effect, in the first stage, the buyer and the merchant get an opportunity to exchange information and proposals in the course of negotiating a binding e-settlement.

If this stage fails to bring the dispute to an end, the second stage comes into the picture. In the second stage, a qualified ODR neutral is appointed, whose job it is to serve as a med-arbitrator between the parties and, if there is a need, to act as an arbitrator issuing a binding e-award. All submissions of documents, arguments and evidence is carried out solely through electronic means with the e-award meant to be rendered to the parties within 20 days from the date that the arbitrator assumed his position. From the moment the arbitral award is rendered to the parties, the third stage of the process begins. In this stage, local organizations take the necessary steps in order to enforce the award and to ensure that the losing party cooperates.¹⁸³ This is a unique regional ODR initiative, specifically intended for resolution of e-commerce cross border consumer disputes, which relies upon the model of online binding arbitration in the event that the mediation negotiations stage fails.¹⁸⁴

On the more global level, there are other initiatives that rely upon the model of a kind of online med-arb. The intention is to soft law, which is comprised of a collection of laws that are the work product of the United Nations Commission on International Trade

¹⁸¹ Known as the "Draft Model Law for Electronic Resolution of Cross-Border E-Commerce Consumer Disputes." Wahab, *supra* note 56, at 439. See also Colin Rule et al., *Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims - OAS Developments*, 42 No. 3 UCC L. J. Art. 1, App. A. (2010) (outlining the proposed changes and system).

¹⁸² Wahab, *supra* note 56, at 439.

¹⁸³ *Id.*

¹⁸⁴ See generally Johnson, *supra* note 5, at 598-601.

Law ("UNCITRAL") ODR Working Group.¹⁸⁵ The central objective of this legislation was "to undertake work in the field of online dispute resolution relating to cross-border electronic commerce transactions, including business-to-business and business-to-consumer transactions."¹⁸⁶ In fact, this initiative did produce a set of procedural rules for online dispute resolution in low-value, high-volume electronic transactions.¹⁸⁷

The model proposed by this legislation is, as stated, a kind of online med-arb, i.e., it is composed of a first stage of negotiations and a kind of facilitative mediation and a second stage that includes binding arbitration and enters the picture only if the first stage fails. It bears noting that this legislation received praise in the scholarly literature and it was said of it, among other things, that "[t]hese draft procedural rules elaborate and emphasize the requirement for a rapid, effective and relatively inexpensive dispute resolution process that can be globally implemented."¹⁸⁸

There is also an example of the use of online med-arb in B2C Internet disputes in the private sector, on the site WebAssured.com.¹⁸⁹ This is a provider of ODR services that provides a kind of online med-arb service in B2C Internet disputes. This site developed a code of professional conduct for e-businesses. An e-business interested in being a member and receiving the WebAssured.com Certification Seal must commit themselves to abide by this professional code. An e-business of this kind must participate in online med-arb processes when a B2C Internet dispute arises.

According to the site's procedures, after an electronic complaint is submitted by the consumer against the e-business, the service provider begins a process of online conciliation on behalf of the consumer. If the attempts at compromise fail, the service provider

¹⁸⁵ Brand, *supra* note 1, at 9

¹⁸⁶ See Brand, *supra* note 1, at 2 (quoting Report of the 43rd Session of UNCITRAL (June 21-July 9, 2010), U.N. DOC. A/65/17, ¶ 257).

¹⁸⁷ Brand, *supra* note 1, at 2.

¹⁸⁸ Wahab, *supra* note 56, at 440. In Brand as well, a recommendation (or hope) can be found that private med-arb will adopt the model mentioned in this legislative proposal. See Brand, *supra* note 1, at 7 ("Because all of the instruments being considered in Working Group III are soft law instruments, and no treaty is proposed, it remains possible for the private sector to undertake and implement much of the same work. This may well be one of those instances where the market will move forward when governments fail to do so.").

¹⁸⁹ WEBASSURED, <http://webassured.com/> [perma.cc/63RW-H7AL] (last visited Jan. 31, 2016). Ponte, *supra* note 38, at 79.

makes use of algorithms in order to identify in which cases the intervention of a human entity is necessary. Afterwards, a mediator is appointed who tries to assist the parties in resolving the dispute online. If the mediator's efforts are not successful, the mediator will make a decision regarding a fair settlement that the e-business is obligated to abide by if it wishes to retain the WebAssured certification seal. An e-business that is a member and does not abide by the settlement determined by the mediator will lose its certification and will be put on the site's watch list of companies that it recommends not to do business with.¹⁹⁰

A further example from the private sector of the application of online med-arb in disputes of this kind can be found at Mediation Arbitration Resolution Services ("MARS").¹⁹¹ According to this application, the merchant and the buyer try, in the first stage, to resolve the dispute between them through online negotiations, the next stage is online mediation and the last stage is online arbitration, only with respect to those matters they were not able to resolve in the earlier stages.¹⁹² In the arbitration stage, the arbitrator, who is the same neutral third party who served as a mediator in the mediation stage, renders a binding arbitral award. According to this application of online med-arb, the arbitral award binds only the merchants (who are members of a program offered by the site),¹⁹³ but not the consumers, who have the option of rejecting the arbitrator's award and adopting other remedies available to them.

To summarize the existing practice of applying online med-arb in international B2C Internet disputes, it may be stated that although the process is just beginning, there is recognition, or the beginning of recognition, of the importance and the potential of this model for the resolution of disputes of this nature. However, the existing applications of online med-arb in this kind of dispute, as well as the proposals to adopt such models, as discussed above, are few, incom-

¹⁹⁰ Ponte, *supra* note 38, at 80.

¹⁹¹ MARS, <https://www.arbresolutions.com> (last visited Jan. 31, 2016).

¹⁹² Schmitz, *supra* note 80, at 199.

¹⁹³ See *id.* at 198 (describing how MARS offers a trustmark program that allows participating merchant members to post the MARS "Shop with Confidence" trustmark that assures customers that it will resolve disputes using MARS' ODR process if disputes cannot be settled through internal customer service process).

plete and, in my opinion, in need of improvement. In the continuation of this chapter below,¹⁹⁴ we will propose, therefore, an upgraded model for online med-arb in such disputes.

4.2.2. Online Med-Arb in B2C Internet Disputes – Getting the Benefits of All Methods

As Haloush observes, “[i]t is necessary to encourage a wide range of flexible solutions in the context of OADR. A “one size fits all” approach will not be appropriate to encourage diverse, innovative, flexible, and effective OADR solutions.”¹⁹⁵

In our view, the online med-arb process has the potential to meet the definition of an *innovative, flexible and effective OADR solution*, as described in the quote above, with respect to international B2C Internet disputes. By its very nature, as explained above,¹⁹⁶ med-arb combines the advantages of mediation with the advantages of arbitration. The sum of these advantages with the addition of the advantages of the online process is likely, as detailed below, to give it an important added value in comparison with the other existing methods in dealing with international B2C Internet disputes (such as online mediation and online arbitration, when they stand independently and separately). As shall be elaborated upon below, these advantages of online med-arb are even likely to take care of most of the disadvantages of online mediation and online arbitration, when they are independent and separate, as was enumerated in the preceding chapter.¹⁹⁷

4.2.2.1. Adoption of the Advantages of Mediation (While Disposing of the Disadvantages of Arbitration)

The central advantage that med-arb receives from the mediation process is the **parties’ autonomy**.¹⁹⁸ The importance of this auton-

¹⁹⁴ See *infra* IV. C. Recommendations: Towards an Upgraded Model of Online Med-Arb Dealing with B2C Internet Disputes.

¹⁹⁵ Haloush, *supra* note 9, at 220 (emphasis added).

¹⁹⁶ See *supra* Part IV.A.

¹⁹⁷ See *supra* Part III.

¹⁹⁸ See *supra* Parts II.C., IV.A.

omy cannot be overstated in a process of alternative dispute resolution, which, as stated above,¹⁹⁹ assists the parties to realize their interest for control of their future through the use of personal volition.²⁰⁰ The realization of the parties' personal autonomy through dispute resolution is perceived, as stated above, as contributing both to enhancing their social skills and to relationships in the entire society.²⁰¹ Moreover, the assertion is, as stated,²⁰² that the dispute resolution process, which increases the parties' autonomy and ensures them greater control of the process and its outcome, increases the probability of reaching an outcome relying upon the true consent of the parties and expressing their real interests and those most important to them.²⁰³ This feature also contributes to the effectiveness of the outcome, because an agreement reached out of the 'true' and free will of the parties is more likely to be honored than an agreement that was not reached in such a manner.²⁰⁴

It bears noting that in the scholarly literature the importance of the parties' autonomy is emphasized in terms of **their very ability to choose** ODR processes, especially in international B2C Internet disputes. As Brand writes:

I then consider the important role of party autonomy in the success of any resulting ODR system. If either the ODR system or national legislation prevents parties from having the autonomy to opt into the resulting system, there can be no successful result. Party autonomy is key to the difficult issues of consumer protection, applicable law, and enforcement within the existing international litigation and arbitration regimes.²⁰⁵

Indeed, the United States Supreme Court emphasized the trend to respect the parties' autonomy in choosing the forum preferred by them for dispute resolution in three decisions.²⁰⁶

¹⁹⁹ See *supra* notes 39–42 and accompanying text (underscoring parties' personal autonomy and self-determination as a central foundation of the mediation process.).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Haloush & Malkawi, *supra* note 3, at 337.

²⁰⁴ *Id.*

²⁰⁵ Brand, *supra* note 1, at 4.

²⁰⁶ See Brand, *supra* note 1, at 10–11 ("These cases are the core of a strong policy

Precisely with respect to this point, as stated above,²⁰⁷ online arbitration is deficient. In this process, the parties' autonomy is very much weakened and, even more troubling, is its weakness at the stage of the parties' *choice* of the online process, particularly with respect to the *click-wrap* pre-dispute arbitration agreements, which are so common today in Internet commercial transactions.²⁰⁸ The criticism of agreements of this nature, as discussed above in the previous part,²⁰⁹ is broad, substantive and relates to the question of the *very agreement* of the consumer to enter into the online arbitration process. The argument is that this is not true consent but rather the result of constraints forced upon the consumer that are likely to give rise to an illusory consent or settlement.

Online med-arb, on the other hand, bypasses this problem and overcomes it, since it includes mediation at the beginning, which, as stated, puts the parties' autonomy at the forefront. During the mediation stage of the process, the parties realize their autonomy, just as they would in a mediation process, i.e., by holding negotiations on their interests and fashioning a win-win agreement comprised of all of these. And, in the stage of entering the process (i.e., the stage of choosing the process), the parties' autonomy is expressed by the fact that the 'click-wrap agreements' will no longer be pre-dispute **arbitration** agreements (with all the attendant criticism of them)²¹⁰ but rather pre-dispute **med-arb** agreements, i.e., agreements that offer the parties a process the first stage of which (the mediation stage) expresses the parties' autonomy in a broad sense (according to the improved model that will be proposed below, in the next section of this chapter²¹¹). In this way, therefore, online med-arb is likely to do away with the most prominent disadvantage of online arbitration, the compromising of the parties' autonomy.

A further advantage of the med-arb effort within the mediation

favoring the ability of parties, in all types of transactions, to choose the forum (whether litigation or arbitration) in which their disputes are to be settled," when describing the use of forum-selection clauses in American courts in three cases: *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), and *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991)).

²⁰⁷ Wahab, *supra* note 56 and accompanying text.

²⁰⁸ *Id.*

²⁰⁹ See *supra* Part III.C.2.

²¹⁰ *Id.*

²¹¹ See *infra* Part IV.C.

process is the fact that mediation is carried out without being subject to the substantive or the procedural law. This advantage has particular significance in international B2C Internet disputes. Because in disputes of this kind the consumer protection laws are likely to be different from country to country, commercial certainty and stability contribute greatly to the process, which from the outset is not subject to legislation, which changes in accordance with the specific consumer, but rather to the parties' agreement. As Brand notes, "[i]t simply makes no sense to design a system states agree is fair to all and then, through rules that require reference to national or regional laws, prevent the use of that system."²¹² One of the failures of online arbitration, as noted above is 'the problems stemming from the process relying on a discussion of rights and laws.'²¹³ Med-arb, whose first stage is mediation, is not subject to the discussion of rights and laws but is, rather, open to the parties' agreements, and is therefore likely to circumvent this failure (especially questions arising regarding choice of law and jurisdiction) and, at least with respect to matters that will be resolved in the mediation stage of the process (through the parties' agreement).

*4.2.2.2. Adoption of the Advantages of Arbitration (While
Disposing of the Disadvantages of Mediation)*

A central advantage of med-arb that was taken, as stated, from the arbitration process, is the **finality of the process**.²¹⁴ Online med-arb ends in any event with the resolution of the dispute, regardless of whether this is through agreement (at the end of the online mediation stage) or through an arbitral award (at the end of the online arbitration stage). In this manner, med-arb disposes with the central disadvantage of online mediation — *the lack of finality*.²¹⁵ Online mediation is at times perceived by parties in the e-commerce market, as stated,²¹⁶ as a solution that is not attractive due to the concern regarding a futile investment of their time, money and energy in a non-binding process. However, when mediation constitutes only one stage of the process and when this stage is supported, to the

²¹² Brand, *supra* note 1, at 4.

²¹³ See *supra* Part III.

²¹⁴ See *supra* note 167 and accompanying text.

²¹⁵ See *supra* Part III.B.2.

²¹⁶ *Id.*

extent necessary, with the additional stage called binding arbitration, the attractiveness of the process for the parties is likely to increase and provide them with a certain degree of security in the e-commerce market.

In addition, through the component of finality, the consumer who operates in the framework of the online med-arb process (as distinguished from online mediation) is assured that he will not be forced to find himself in court in an attempt to receive a remedy for his grievance against the merchant if the mediation stage of the process fails. Since in such disputes resolution of the dispute in court is not a real option (and is certainly not worthwhile or attractive for the consumer due to problems of financial cost, choice of law, jurisdiction etc.),²¹⁷ such an assurance is invaluable.

It bears emphasis that such an assurance, which is made possible due to finality, is likely to dispose of another disadvantage of online mediation, as noted above, the *costs of the process*.²¹⁸ As Schmitz states, "[a]lthough some have critiqued arbitration's finality, this finality can be very beneficial for consumers who usually lack the resources to pursue costly appeals processes. It eases costs and burdens of appeals for consumers."²¹⁹

In other words, in spite of the fact that the (usually) low monetary value of the Internet acquisition transaction is likely to detract from the attractiveness of online **mediation** for the consumer, as long as it is not totally free,²²⁰ the addition of the advantage of finality in online **med-arb** is likely to increase the value of the process for the consumer since it includes the assurance of saving the costs of a judicial process, unlike the case of online mediation.

Finality also contributes to disposing with another disadvantage of online mediation, as discussed above; its lack of attractiveness due to the low rate of achieving agreements.²²¹ In online med-arb, as distinguished from online mediation, the non-achievement of an agreement does not constitute a cardinal disadvantage, because in any event the dispute will be resolved, if not through an agreement,

²¹⁷ See *supra* note 19 and accompanying text (describing the inefficiency, inconvenience, and inaccessibility in bringing low-value consumer claims through the formalities of the court system).

²¹⁸ See *supra* Part III.B.3.

²¹⁹ Schmitz, *supra* note 80, at 206.

²²⁰ See *supra* Part III.B.3 (discussing various costs inherent in the med-arb process).

²²¹ See *supra* Part III.B.4.

then through a binding arbitral award. Therefore, the low rate of achieving agreements, which is likely to dissuade both consumers and merchants from using the online **mediation** process, will not necessarily dissuade them from using online **med-arb**, of which mediation is only the first, but not the only, stage.

Moreover, the fact that the med-arb process includes, during its arbitration stage, a coercive third party, i.e., an arbitrator who renders a binding arbitral award, is likely to assist in disposing of another failure existing in online mediation as presented above — the disadvantages stemming from the parties' autonomy.²²² As stated, the complete autonomy of the parties in the mediation process is likely to cause their downfall and to compromise due process in cases of clear power gaps between the parties, with Internet commerce disputes between a merchant and a buyer (B2C Internet disputes) serving as a classic example of such power gaps.

In online **mediation**, the mediator is indeed prevented from intervening and assisting the weaker party due to his duty of neutrality. Similarly, in the absence of legislation protecting the consumer (in a process such as mediation, which is not subject to either the substantive or the procedural law), the consumer's status is weakened and he is more exposed to manipulations of the other party.²²³ In online **med-arb**, by distinction, the power gaps do not necessarily influence the final outcome. The consumer is not forced to give in, during the mediation stage, to an unfair agreement or one that reflects the power gaps to his detriment, simply in order to finish the dispute quickly and outside of court. Quite the opposite, all of the subjects as to which the power gaps between the parties prevent a fair resolution are moved onto the arbitration stage of the process. In that stage, the med-arbitrator will decide with respect to them according to his discretion, while in his decision he is free to do justice, based on a fair balance of the power gaps and provision of an appropriate remedy to the weaker party. In other words, in med-arb, as opposed to mediation, the consumer (the weaker party) has an a priori power advantage by virtue of the advance knowledge that the process gives him the option of the intervention of an outside third party who will render a decision.

It goes without saying that by including the arbitration stage, online med-arb has all of the other advantages of online arbitration

²²² See *supra* Part III.B.1.

²²³ See *supra* note 100 and accompanying text.

as enumerated above in Chapter III.²²⁴

*4.2.2.3. Added Advantages of Med-Arb in International B2C
Internet Disputes*

Beyond the adoption of the advantages of online mediation and arbitration while disposing of their disadvantages, med-arb has added advantages of its own, as set forth above in the beginning of this chapter.²²⁵ By this we mean, *inter alia*, advantages such as **efficiency**, serving as an **incentive to the parties to reach an agreement** and serving as an **incentive for candid and fair conduct during the mediation stage of the process**.²²⁶

With respect to the advantage of **efficiency**, there are findings that the offline med-arb process saves time and money as compared to both mediation and arbitration carried out independently and separately. This is both because the same person serves both as mediator and as arbitrator (and due to the continuity between the two processes) and because in and of itself the outcome in med-arb is relatively fast and the cost to the parties is fair.²²⁷

It would be impossible to overstate the importance of speed, alongside the financial advantage for the consumer in international B2C Internet disputes, both due to the fact that the value of the transaction in such disputes is generally low (thereby requiring an ODR process chosen to be profitable for those using it) and due to the large economic gap between the seller (who is usually a strong financial body) and the consumer. Online med-arb, which saves time and costs, is likely to significantly contribute to balancing this gap and at least to not widening it to the detriment of the consumer, who is usually the plaintiff in the dispute and bears most of its costs.

It bears emphasis that precisely as to this point, with respect to the advantage of efficiency, the added value and the vital need of **integrating the two processes** into one joint process stands out particularly. As Johnson notes:

[T]o date, the vast majority of ODR services provide media-

²²⁴ See *supra* Part III.C.

²²⁵ See *supra* notes 167-175 and accompanying text.

²²⁶ As set forth at the beginning of this chapter, in Part A. What is Med-Arb?

²²⁷ David C. Elliott, *Med/Arb: Fraught with Danger or Ripe with Opportunity?*, 34 ALTA L. REV. 163, 164 (1995).

tion, which has left online arbitration relatively undeveloped. This is most likely due to the fact that the average cost of arbitration is significantly more than the average amount involved in e-commerce disputes, which has made mediation a much more preferable option of dispute resolution. Nonetheless, when mediation fails, 'online arbitration may be the only feasible option in cases where the low value of the transaction effectively bars the consumer from seeking redress or where one or more of the parties cannot afford to travel abroad.'²²⁸

A further unique advantage of the med-arb process is, as stated, the fact that it serves as an **incentive for the parties to reach an agreement**, due to the fact that the presence of the mediator-arbitrator and the threat looming in the background of an arbitral award provides an incentive to the parties to resolve their problems successfully during the mediation stage.²²⁹ This unique advantage of med-arb is likely to dispose of the disadvantage of online mediation, as noted above,²³⁰ of a low rate of reaching agreements in e-commerce disputes. In other words, it could very well be that the low rate, at present, of reaching agreements in e-commerce disputes, which characterizes online mediation, is likely to change if an additional stage of online arbitration is added to it, as med-arb offers, due to the incentives it creates.

A further unique advantage of the med-arb process discussed above is, as stated,²³¹ is that it serves as an **incentive to the parties to conduct themselves candidly and fairly during the mediation stage**, knowing that if they fail to arrive at a settlement at the end of this stage, they will lose control of the outcome. Clearly, this contribution to the fairness and decency of the process is of great importance. In such transactions, where the consumer is in an inferior position from the outset, as explained above,²³² and where the concern regarding manipulative and unfair behavior on the part of the merchant is real (due to the fact that this is *private justice* and there is no consumer protection, which is set out in the substantive law

²²⁸ Johnson, *supra* note 5, at 582–83.

²²⁹ *Supra* notes 167–175 and accompanying text.

²³⁰ *Supra* Part III.B.4.

²³¹ See *supra* notes 171–73 and accompanying text.

²³² See *supra* notes 174–75 and accompanying text.

and enforced only in the judicial process);²³³ one of the significant challenges of the ODR mechanism is granting consumer protection which is not less than what the consumer would receive in the real world. Every process of dispute resolution, which constitutes an incentive for the parties to it to conduct themselves fairly and decently, is likely to make a serious contribution to the increase of trust of consumers in the global market of Internet commerce and thereby to significantly increase chances for its future development.

4.2.2.4. *Adoption of the Advantages of the Online Process*

However, in analyzing OADR, one must contemplate primarily the value of fair process which OADR solutions are subject to, and the value of efficiency which OADR solutions are seen to achieve.²³⁴

Because it is online, online med-arb also adopts the many advantages of the ODR mechanism, as transpires from the quote above, and as was elaborated upon in the previous chapter.²³⁵ These advantages are particularly prominent in international B2C Internet disputes. For example, the **efficiency and the fairness** mentioned in the quote above, as well as the **convenience**, mentioned above,²³⁶ are even more important due to the fact that the med-arb process is online. The online aspect of online arbitration, the savings in time and the convenience of online dispute resolution promote receiving arbitral awards quickly as well.²³⁷ These arbitral awards can then be efficiently communicated to parties and preserved online. This enables the consumer to take the decision and have it immediately enforced, thereby saving himself many of the measures that he would have had to take in order to receive a remedy through face-to-face court and arbitration processes.²³⁸

Moreover, it is precisely online med-arb which is likely to overcome what is perceived as the central disadvantage of the online process – the lack of face-to-face interactions and the concern with

²³³ See *supra* notes 95, 100 and accompanying text. These things stand out more in the context of dispute resolution in the Internet environment, as the physical distance between parties enables fraud or exploitation with greater ease.

²³⁴ Haloush, *supra* note 9, at iii.

²³⁵ See *supra* Chapter III.A.

²³⁶ *Id.*

²³⁷ Schmitz, *supra* note 80, at 205.

²³⁸ *Id.*

regard to 'thinner' communications in the process, as a result.²³⁹ As explained above, arbitration, does not set an objective for itself of improving the communications between the parties.²⁴⁰ Communications in an arbitration process are not complex and are likely to rely only on the exchange of pleadings, evidence and other written stages. Therefore, the disadvantage of 'thin' communications is, as a matter of course, less significant.

Regarding the concern with respect to *thin* communications in the mediation stage of online med-arb, such concern can be overcome there as well. **First**, even in an online environment a meeting can be held in which the parties see one another, through the use of simple and available means of video and digital cameras. The current technology enables the use of larger computer screens with better resolution. This in turn means much more information can be presented in a clearer and more sophisticated manner. The screens in use currently have color, shapes, animation and sound. The possibility of integrating between all of these through high-speed network connections gives us a significant communications tool. **Second**, the expression of emotions is also possible in an online process, even through purely textual communications. Studies demonstrate that parties do not feel particularly limited as to their ability to express emotions in written online communications. It transpires that they simply use various means, specific to the expression of emotions in such communications,²⁴¹ whether through the use of capital letters in order to express a scream,²⁴² through the use of an exclamation mark or a smiley face, frowny face, or other emoticons that enable the parties to express emotions in a manner that is uniquely suited to written communications.²⁴³ The argument is, therefore, that the online environment also has **its own new** sources and tools enabling the parties to express themselves effectively. The virtual

²³⁹ Brennan, *supra* note 75; Gillieron, *supra* note 75; Beal, *supra* note 76.

²⁴⁰ Brennan, *supra* note 75; Gillieron, *supra* note 75; Schmitz, *supra* note 80, at 184–185. *See also supra* notes 114–15 and accompanying text.

²⁴¹ Marta Poblet & Pompeu Casanovas, *Emotions In ODR*, 21 INT'L REV. L. COMPUT. & TECH. 145, 149 (2007) ("[R]ecent findings may moderate some concerns about ODR as an impersonal environment where emotions cannot be used as contextual or interactive cues.").

²⁴² Susan Summers Raines, *Can Online Mediation Be Transformative? Tales From The Front*, 22 (no. 4) CONFLICT RESOL. Q. 437 (2005).

²⁴³ Ebner, *supra* note 32, at 392.

world does not hide feelings. It is certainly possible to develop alternative patterns of conduct that will reflect the parties' feelings.

Moreover, it transpires that the use of technology in the online process is likely and should be **an advantage in and of itself**. As Haloush and Malkawi put it:

Although many traditional ADR systems draw their strength from face-to-face interactions, online ADR should not seek to replicate those conditions. Instead, it should use the advantages of online technology to forge a new path. This new path should focus on using the networks to maximize the power of technology, a power which may be missing in face to face encounters, instead of duplicating the richness of face-to-face environment.²⁴⁴

In other words: Technological applications are likely to improve the med-arbitrator's skills and in so doing **improve** online med-arb **in comparison to its traditional counterpart**, offline med-arb. It is not for nothing that such applications are called the *fourth party*,²⁴⁵ but rather due to the fact that they add advantages to the traditional process such as authority, quality and trust and thereby significantly increases the chance for success of the process.²⁴⁶

From the above, it transpires that by combining the three components of mediation, arbitration and technology (i.e., the online process), online med-arb **joins together** on the one hand, all of the **advantages** of each of these three components, and on the other hand **disposes with the disadvantages** of each of them when they are used independently. It would seem, therefore, that in joining together all of these worlds, with the added advantages of its own (as discussed above),²⁴⁷ online med-arb is likely to fulfill a futuristic, important and central role in developing the ODR mechanism in international B2C Internet disputes.

Notwithstanding all of this, we cannot ignore the criticism of the med-arb process, as detailed below.

²⁴⁴ Haloush & Malkawi, *supra* note 3, at 333.

²⁴⁵ Katsh & Rifkin, *supra* note 17.

²⁴⁶ Haloush & Malkawi, *supra* note 3, at 333.

²⁴⁷ See *supra* Chapter IV.B.2.c.

4.2.2.5. Criticism and Alleged Disadvantages of Med-Arb

One of the criticisms voiced against offline med-arb is with respect to the **manner in which the parties conduct themselves**. The critics argue that in the mediation stage the parties will be apprehensive about exposing information that they would expose in a *pure* mediation process, because of the *threatened* arbitration proceeding looming in the background. The assumption is that, as distinguished from mediation, which requires openness and candidness, the arbitration process requires *calculation*. The argument is that because the parties are aware of the med-arbitrator's judicial authority and due to their concern that during the arbitration stage he will use the information that they exposed during the mediation stage, they will refrain from effective cooperation in the mediation stage.²⁴⁸ In response to this allegation, the supporters of med-arb argue that this concern has no empirical basis, and that, quite the opposite, there is empirical evidence pointing to the parties' openness during the med-arb process.²⁴⁹

Further criticism of med-arb is that there is **potential for compromising the med-arbitrator's neutrality** due to his double role as both a mediator and an arbitrator. In med-arb, the med-arbitrator is exposed to diverse information in the mediation stage. The intent, *inter alia*, is to confidential information not only regarding the specific case, but also regarding the parties' interests, that are not exposed in the course of a normal arbitration proceeding, such as intimate, emotional or personal information, that "is not relevant from a legal perspective."²⁵⁰ Even though there is no problem in terms of the mediator in *pure* mediation (because the mediator does not have the authority to render a decision), in med-arb, the exposure to this kind of information is likely to incline the med-arbitrator towards one party and to adversely affect the outcome of the process,²⁵¹ since

²⁴⁸ Blankenship, *supra* note 162, at 36-37.

²⁴⁹ *Id.* at 37. See also Neil B. McGillicuddy, et al., *Third-Party Intervention: A Field Experiment Comparing Three Different Models*, 53 PERSONALITY & SOC. PSYCHOL. J. 104, 110 (1987) (noting the results of an empirical study "favor the med/arb(same) procedure in contrast to straight mediation").

²⁵⁰ *Id.*

²⁵¹ Moreover, the second party does not know what was said in the separate meetings, and therefore cannot refute the information during the arbitration stage. This is considered a serious breach in terms of justice and due process. See Edna Sussman, *Developing an Effective Med-Arb/Arb-Med Process*, 2 N.Y. DISP. RESOL. LAW. 71, 72 (2009) (describing the legality of a combined mediator-arbitrator in

it cannot be expected that the med-arbitrator will be able to block all critical information submitted during the mediation stage. The concern, therefore, is that the med-arbitrator will not be able to remain neutral during the stage of making a determination of the arbitral award, after he has had access to information from the preliminary mediation stage that he never would have been exposed to in *pure* arbitration.

A further argument against med-arb points to the **coercive component** of the process, which is the result of the med-arbitrator's *power*. The argument is that placing the authority to render a decision in the hands of the same person who is also trying to mediate between the parties, who also has the ability to threaten termination of the mediation process at any time (e.g., if the parties are not making progress and in order to move on to the arbitration stage), gives him a great deal of power. The critics argue that this combination is likely to cause the med-arbitrator to impose his opinion on the parties, and that the final outcome of the mediation stage is likely to be forced and to infringe upon the free will of the parties and the volitional nature of the process as well as their true agreement.²⁵² The argument is, therefore, that the *agreements* at which the parties arrived during the mediation stage are the result of pressure (even indirect) on the part of the med-arbitrator, and therefore do not constitute real agreement.²⁵³

The following chapter will deal with this criticism, as well as with other failures that characterize online **arbitration**, as discussed above in Chapter III,²⁵⁴ through the proposal of an upgraded model for online med-arb in international B2C Internet disputes.

4.3. Recommendations: Towards an Upgraded Model of Online Med-Arb Dealing with B2C Internet Disputes

In this section of this chapter we propose an updated model of online med-arb for dealing with international B2C Internet disputes, or in other words, we present a number of improvements and proposals for upgrading the existing model for dealing with disputes of

disputes).

²⁵² Barry C. Bartel, *Med-Arb As A Distinct Method Of Dispute Resolution: History, Analysis, And Potential*, 27 WILLAMETTE L. REV. 661, 679 (1991).

²⁵³ Blankenship, *supra* note 162, at 36.

²⁵⁴ See *supra* Chapter III.

this kind.²⁵⁵

4.3.1. Med-Arb Agreements

First of all, our proposal is to replace the pre-dispute **arbitration** agreements, that are very common at present on the various e-commerce sites,²⁵⁶ with pre-dispute **med-arb** agreements. By signing agreements of this latter kind, the consumers and merchants will in effect be expressing their consent to enter an online med-arb process in the event of a dispute between them, that will be provided by a provider of online dispute resolution services. The proposed implementation, therefore, is an online process composed of two stages. The first stage is online mediation carried out by a neutral mediator who will be placed at the disposal of the parties by the ODR service provider, as stated, whereas the second stage – online arbitration – will deal only with those matters that could not be resolved in the previous stage. In the arbitration stage, the arbitrator, who is the same neutral third party who served as the mediator during the mediation stage, will render a binding arbitral award.

It bears emphasizing that click-wrap agreements have been found to be efficient, effective and convenient, however, the criticism of them, as set forth above,²⁵⁷ stems from the concern regarding their coercive nature. Our proposal to adopt pre-dispute **med-arb** agreements is likely to dispense with this concern because even if there is a component of coercion (coercing the entry into the online process in order to resolve the dispute), this is reduced coercion because it coerces entry into a process, the first stage of which is online **mediation**, in which, as explained, the parties' autonomy is at its pinnacle.²⁵⁸

4.3.2. Means to strengthen the parties' autonomy

It is further proposed – In order to strengthen the parties' autonomy from **their very entry into the online med-arb process, and their genuine consent** to use the process to resolve the dispute – to adopt a number of means of security or caution as follows:

First, the pre-dispute **med-arb** agreement must be published on

²⁵⁵ See *supra* Chapter IV.B.1.

²⁵⁶ Johnson, *supra* note 128 and accompanying text.

²⁵⁷ Johnson, *supra* note 133; Johnson, *supra* note 134; Schmitz, *supra* note 80, at 135; *Supra* note 136; *Supra* notes 133–36 and accompanying text.

²⁵⁸ See *supra* note 39 and accompanying text.

the e-commerce site (the merchant's site) in a prominent place, alongside an explanation of any information regarding the online med-arb process, how it works, the fact that it ends with a binding arbitral award, any consumer fees and secure links for filing claims and gathering further information. This information must be open, accessible and user-friendly and must not cause information overload so as to prevent the consumer from reading the conditions of use.²⁵⁹ **Second**, the consumer will be asked to carry out a number of actions signifying his consent to the conditions of use.²⁶⁰ **Third**, the consumer must be notified that he is entering into a binding e-agreement that is equivalent to and just as binding as paper and signature based documents. **Fourth**, there must be adequate and clear notice on the e-commerce site, e.g., emphasis with a color that stands out, regarding the existence of online **med-arb** agreements. **Fifth**, it must be ascertained that the consumer cannot receive the product or service without explicitly expressing his consent to these e-clauses. **Sixth**, digital signature technologies and encryption must be used to authenticate a consumer's consent or to preserve additional information that the Internet provider is likely to receive, including the IP address of the addressee or any other relevant information.²⁶¹

4.3.3. *Additional security and cautionary measures to ensure consent*

In addition, due to the existing criticism of the med-arb process (not necessarily online med-arb) as presented above,²⁶² additional security and cautionary measures must be used in order to ensure informed consent of the parties prior to them entering the process. Prior to their signing the online **med-arb** agreement, the parties must be signed on a document detailing the risks, such as those enumerated above,²⁶³ involved in the use of the process, as well as having them sign a waiver of the right to replace the med-arbitrator (or to disqualify him) and a waiver of the right to appeal his decision.

Indeed, one of the solutions that has been proposed in the scholarly discourse as a general solution in view of the criticism of the offline med-arb process (as discussed in the previous chapter,

²⁵⁹ See Schmitz, *supra* note 80, at 234 (stating that some website already explain the details of their OArb process).

²⁶⁰ Wahab, *supra* note 56, at 410.

²⁶¹ *Id.*

²⁶² See *supra* Chapter IV.B.2.e.

²⁶³ *Id.*

above) and in order to address many of the disadvantages attributed to it,²⁶⁴ is the signature of the parties, prior to beginning the med-arb process, on an informative document regarding the risks and ethical dilemmas with respect to this hybrid process. In California, the ADR Practice Guide includes an informative document of this nature. The parties who sign it prior to the beginning of the med-arb declare that they were informed that the med-arbitrator may be influenced by confidential information made known to him during the mediation stage of the process and that:

The parties understand that this process will likely cause the arbitrator to receive information that might not otherwise have been received as evidence in the arbitration and to receive information confidentially from each of the parties that may not be disclosed to the other side.²⁶⁵

Similarly, the parties undertake in this document not to sue the med-arbitrator or to attack the outcome of the med-arb (the mediation settlement and the arbitral award at its end) on the basis of these risks. Clearly there is also a contribution to strengthening the advantage of finality. We propose adoption of such a med-arb document for online med-arb processes to deal with international B2C Internet disputes as well, and to include in it a declaration of the parties that the med-arbitrator informed them of the disadvantages of the process.

It bears emphasizing that these cautionary means, in strengthening the foundation of the parties' consent to the click-wrap agreements, increase both the fairness of the online med-arb process and the chance that such agreements will be valid and enforceable (as constituting strong evidence of the true consent of the parties to adopt them). In this way it is possible, therefore, to resolve, at least partially, the problem of enforceability and recognition presented above as one of the disadvantages of online arbitration.²⁶⁶

4.3.4. *The trustmark program*

In addition, our recommendation is to adopt the *trustmark pro-*

²⁶⁴ *Id.*

²⁶⁵ Phillips, *supra* note 169, at 27.

²⁶⁶ See *supra* Chapter III.C.2.

gram (as it currently exists on various sites of ODR service providers)²⁶⁷ for online med-arb when dealing with international B2C Internet disputes.²⁶⁸ In effect, the *trustmark program* enables member e-merchants to advertise on their sites a kind of seal of approval that attests that they have agreed to adopt the principles of fair Internet commerce or consumer protection guidelines,²⁶⁹ as published by an external site that is a provider of ODR services (that grants such seals of approval) and that they undertake, whenever a dispute arises with a consumer, to go to such service provider for resolution of the dispute through the ODR process and to comply with the decision rendered by the service provider in such process.²⁷⁰ In addition, the ODR service provider reports to the Federal Trade Commission (FTC) and other consumer protection agencies with respect to any merchant who is a member in the trustmark program and who fails to participate in any customer-instigated ODR processes and puts the member merchant on a *wall of shame* list published on the service provider's site.²⁷¹

The trustmark program has various advantages and significant potential in disposing of the disadvantages of the ODR mechanism, and particularly the disadvantages of online arbitration, as enumerated above. For example, this program has a great deal of potential to build confidence in the online process for dispute resolution,²⁷² thus resolving the problem of trust as presented above.²⁷³ The very knowledge that there is someone supervising the conduct of e-merchants *forces* parties to adhere to the principles of fair e-commerce, including consumer protection guidelines, thereby strengthening the trust of the consumer in e-commerce and the ability of the online process to provide redress in the case of a dispute under this umbrella in particular.

Additionally, the existence of the *wall of shame* and the danger of damaging the reputation of the e-merchant as a result of the existence of this mechanism is likely to provide a real incentive for him

²⁶⁷ Schmitz, *supra* note 80, at 198–199 (outlining the Mediation Arbitration Resolution Services (MARS) ODR process for its trustmark program).

²⁶⁸ INTERNET- ARBITRATION, <http://www.net-arb.com> (last visited Jan. 31, 2016).

²⁶⁹ Schmitz, *supra* note 80, at 198.

²⁷⁰ *Id.*

²⁷¹ *Id.* at 186.

²⁷² *Id.* at 218.

²⁷³ See *supra* Chapter III.C.3.b.

to abide by the arbitral award, which is rendered at the end of the online med-arb process.²⁷⁴ All of this can occur without the need for judicial enforcement mechanisms or stringent local laws (which are likely to vary from country to country and therefore contribute to an overall lack of stability and certainty). In this manner the problem of enforceability and recognition can be bypassed,²⁷⁵ and the problem of the lack of a universal, uniform and binding regulatory scheme can be addressed as presented above.²⁷⁶ As Schmitz notes, "non-legal forces fostered by . . . control mechanisms also may serve as de facto enforcement mechanisms for OArb agreements and awards".²⁷⁷

4.3.5. *Concerns regarding due process and technological gaps*

With respect to the concern regarding compromising due process because of technological power gaps, as discussed above as one of the problems of online arbitration,²⁷⁸ it must first be noted that this problem is reduced in the realm of online med-arb, as opposed to online arbitration. In online med-arb, at least in the first part, the stage of online mediation, there is no problem of electronic submission of the parties' evidence. As to the arbitration part of online med-arb, in order to preserve due process and to enable the parties to voice their arguments and to carry out their electronic submission on an equal footing, with the objective of fashioning a fair and objective process, a number of recognized arbitration institutions have developed special and successful platforms and services with respect to e-filing and e-management of arbitral proceedings. For example, the AAA WebFile,²⁷⁹ the ICC NetCase²⁸⁰ and the CIETAC Online Dispute Resolution Center.²⁸¹ Our recommendation, therefore, is that providers of ODR services, including online med-arb

²⁷⁴ Schmitz, *supra* note 80, at 212–13.

²⁷⁵ See *supra* Chapter III.C.2.

²⁷⁶ See *supra* Chapter III.C.3.

²⁷⁷ Schmitz, *supra* note 80, at 212.

²⁷⁸ See *supra* Chapter III.C.3.c.

²⁷⁹ AMERICAN ARBITRATION ASSOCIATION, <https://apps.adr.org/web-file/> [per-ma.cc/AHK5-5VLW] (last visited Jan. 31, 2016).

²⁸⁰ Wahab, *supra* note 56, at 416.

²⁸¹ CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION, www.cietacodr.org [perma.cc/MNT7-G4R7] (last visited Jan. 31, 2016).

services, adopt platforms and services that are able to 'host' the requirements of online arbitration for a fair, equal and objective process.²⁸² They must aim for a minimal level of due process that will protect every end-user.²⁸³

4.3.6. Confidentiality and privacy concerns

Regarding the concern with respect to confidentiality and privacy of data discussed above,²⁸⁴ it is clear that electronic messages and communications must be protected by electronic means. Similarly, electronic communications must be protected in the course of the online med-arb process, but also before and after it.²⁸⁵ Indeed, out of an understanding and recognition of the importance of the duty of confidentiality and the need for special protection of it in an online process, various arbitration institutions have published internal rules and guidelines regarding the proper use of online technology in an online arbitration process.²⁸⁶ Therefore, the online med-arb service providers must be aware of the dangers awaiting them in technological communications and therefore take the necessary measures to reduce such dangers. Among other things, they must inform their clients regarding the existing dangers and the options available for minimizing them.

Additionally, for the purpose of ensuring confidentiality of information transmitted on the Internet (such as the electronic submission of evidence by the parties) the service provider may be assisted by encryption technologies, firewalls and passwords, as well as privacy enhancing technologies (PET's).²⁸⁷ Encryption technology is likely to protect the confidentiality of the process itself as well as the authenticity of any electronic communications, in order to prevent unauthorized access to information. Clearly, the problem of trust presented above²⁸⁸ will be reduced when end users know about

²⁸² Wahab, *supra* note 56, at 415-16.

²⁸³ See Schmitz, *supra* note 80, at 220 ("Policies must therefore aim to protect a base level of procedural fairness for all disputants, and seek to ensure that all parties may present their cases for resolution through a substantially fair, neutral and reliable process.").

²⁸⁴ See *supra* Chapter III.C.a. (pinpointing various vulnerabilities of online communication data, including computer crashing, hacker access, and virus harm).

²⁸⁵ Navlani, *supra* note 152, at 11.

²⁸⁶ Wahab, *supra* note 31, at 412.

²⁸⁷ *Id.* at 413.

²⁸⁸ See *supra* Chapter III.C.b.

these security and protection devices. In order to increase the parties' trust in the process and the system, anti-virus and anti-malware programs can also be used.

Indeed, many ODR service providers use special means to protect their program security and incorporate their own Internet security measures in their systems.²⁸⁹ Among other things, they use dedicated password protected and secured servers for conducting all of their processes and storing communications relating to the cases they handle.²⁹⁰ It bears emphasis that all of these means of electronic security and protection are necessary in order to protect the communications on two planes – between merchant sites and their users and between the parties and a dispute resolver.

4.3.7. *The problem of trust*

One of the problems presented in the previous chapter is the 'problem of trust' on the part of the end user, in the absence of a universal binding legislative scheme controlling the training requirements for service providers. Since there are no licensing or registration requirements for ODR providers, the parties are left exposed to the danger of unprofessional or inappropriate services. First, our recommendation is that, beyond expertise in the field of dispute resolution and particularly med-arb and beyond his expertise in the field of online technology and communications, the med-arbitrator must be expert in the field of commercial consumer contracts, commercial arbitration and the relevant legal aspects. Additionally, one of the solutions offered in the scholarly literature is the proposal for specialized training and standards for ODR practitioners.²⁹¹ Moreover, it seems that accreditation of ODR service providers is also provided, as well as a set of regulatory and procedural norms that guarantee availability of quality proceedings.²⁹²

Another proposal is to make providers of online med-arb services subject to registration requirements that mandate proper med-arb training, as well as secure and dependable processes.²⁹³

²⁸⁹ Schmitz, *supra* note 80, at 216.

²⁹⁰ *Id.*

²⁹¹ Ponte, *supra* note 38, at 87.

²⁹² Wahab, *supra* note 56, at 438.

²⁹³ See Navlani, *supra* note 152, at 13, 19–20 (“[P]roviders should be subject to registration requirements that mandate proper arbitration training, as well as secure and dependable processes.”).

The registration is likely to be through a central website, and it would have to also include a supervised and up-to-date database regarding registered service providers and their med-arbitrators. This database must be accessible without cost in order to assist consumers and merchants in choosing trustworthy providers of online med-arb services.²⁹⁴

A further means for dealing with the *problem of trust* by increasing the trust of end users in online med-arb would be to provide consumers with the opportunity to express their opinion of the online med-arb that they experienced through opinion posting. This means is likely to provide an incentive both to the med-arbitrators and to the providers of ODR services to remain unbiased and balanced, as well as increasing consumer trust in the system's process.²⁹⁵

4.3.8. A public awareness campaign

In order to promote online med-arb as a tool for dealing with international B2C Internet disputes, a broader public awareness campaign is necessary. The objective would be to raise public awareness of the concept of ODR and particularly of online med-arb, alongside legal recognition, both global and local, of electronic documentation and signatures.

4.3.9. The problem of cost

In order to overcome the cost problem presented above,²⁹⁶ particularly in view of the fact that the type of disputes under discussion here are generally low-value transactions, and out of a desire to develop the e-commerce market, our recommendation is for low or no-cost online med-arb. It bears emphasis, particularly with respect to online med-arb, as distinguished from online arbitration, that costs can be lowered. Med-arb that ends with the mediation stage saves the parties the costs of arbitration, which is generally more costly than the mediation process. This fact must be brought to the parties' attention before they begin the process.

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 19.

²⁹⁶ See *supra* Chapter III.C.d.

4.4 Summary

The hope is that all of the proposals raised thus far for the improvement of the existing model of online med-arb in B2C Internet disputes will assist in promoting a global online marketplace and will give consumers a viable, effective and fair option to resolve their transnational commercial e-disputes.

As to the criticism and the alleged disadvantages of med-arb, as discussed in the previous portion of this chapter²⁹⁷:

With respect to the argument relating to the **conduct of the parties** and the concern regarding lack of cooperation during the mediation stage of the process due to the looming threat of the arbitration process, **online** med-arb offers a significant advantage. There are studies that point to the fact that people have a greater tendency *open up* precisely in online communications.²⁹⁸ Therefore, this concern is mitigated in comparison to **offline** med-arb, where this criticism initially arose.

Regarding the further criticism of med-arb (such as the argument with respect to a **potential erosion of the med-arbitrator's neutrality**²⁹⁹ (as well as the allegation that **there is a coercive component to med-arb**), it seems that all of these are variations on the same theme: the neutral third party removes the hat of a mediator at the end of the mediation stage and wears the hat of an arbitrator. It is our argument that the solution to the ethical concerns or dilemmas that such a situation is likely to create lies in various protections for the parties as discussed above in this chapter, such as professional, experienced med-arbitrators, prior informed consent of the parties to the process and its outcomes, which is given after the nature and risks of the process and the roles of everyone involved is made clear, etc. Additionally, the mediator need not serve as the arbitrator in the case. The parties may decide on a different med-arb model, such as the *opt-out med-arb*, according to which, at the end of the mediation stage and prior to the arbitration stage, each party may request that someone else be appointed arbitrator. In this situation, many of the concerns and ethical dilemmas stemming from

²⁹⁷ See *supra* Chapter IV.B.2.e.

²⁹⁸ Rule, *supra* note 73.

²⁹⁹ See *supra* Chapter IV.B.2.e.

the issue of the mediator's neutrality are likely to be resolved.³⁰⁰ According to supporters of the process, even if there is not necessarily one hundred percent protection of the process' propriety, it still significantly reduces the dangers and strengthens the parties' right to self-determination and choice in the process, the advantages of which, it would seem, are far greater than the alleged disadvantages.³⁰¹

5. CONCLUSION

The effective exercise of the freedoms of the Internet Market makes it necessary to guarantee victims effective access to means of settling disputes. Member states should examine the need to provide access to judicial procedures by appropriate electronic means.³⁰²

Furthermore, promoting the creation of **new** dispute settlement mechanisms with an online application was identified as a priority to encourage electronic commerce by the Federal Trade Commission in the United States.³⁰³

This article seeks to promote the development of a relatively new way to resolve disputes online, particularly in the area of international B2C Internet disputes: **online med-arb**.

Out of the understanding that, for consumers in such transactions, access to courts is not access to justice, ODR methods have been developed on the Internet that are considered to be efficient, effective, transparent and fair and that are likely to offer hope for true justice in such disputes.³⁰⁴ This article surveyed the main meth-

³⁰⁰ See Haloush, *supra* note 9, at 86 ([A]rbitration should not be offered by the same impartial that offers mediation services [T]here should be two different neutrals because of the nature of the disclosures and the interaction that takes place in the mediation, unless the parties agree to use the mediator as an arbitrator.").

³⁰¹ Yolanda Vorys, *The Best of Both Worlds: The Use of Med-Arb for Resolving Will Disputes*, 22 OHIO ST. J. ON DISP. RESOL., 871, 895 (2007). See also Blankenship, *supra* note 162, at 36.

³⁰² Haloush, *supra* note 9, at 13 (quoting Article 52 of the Directive of the European Parliament and of the Council on Certain Legal Aspects of Information Society Service, in Particular Electronic Commerce, in the Internal Market, (2000/3 I/EC) O. J. L. 178).

³⁰³ Haloush, *supra* note 9, at 11 (emphasis added).

³⁰⁴ See Haloush, *supra* note 9, at iii ("[O]ne must contemplate primarily the value of far process which OADR solutions are subject to, and the value of efficiency which OADR solutions are seen to achieve.").

ods: online mediation and online arbitration. However, these existing methods have disadvantages and raise their own concerns, as discussed herein.

There is no doubt that the transition of ADR to cyberspace and its reformulation as ODR creates challenges that must be dealt with, but it also presents opportunities that should not be ignored. According to this article, online med-arb is one of these opportunities. Online med-arb, comprised of online mediation at the beginning and arbitration at the end, has advantages of its own, alongside the potential of disposing of the existing disadvantages of online mediation and arbitration, when they are used alone. In its upgraded form (according to the model proposed in this article), it is even likely to overcome the further disadvantages such as those belonging to offline med-arb or online process in general. If so, it seems that online med-arb has an important, central and futuristic role in improving the existing ODR mechanism.

With respect to international B2C Internet disputes, it is important to remember that “only after users of online marketplaces can obtain redress will the real potential of e-commerce be achieved.”³⁰⁵

Online med-arb might make a very significant contribution to both international trade and consumer protection. Admittedly, in dealing with international B2C Internet disputes, online med-arb combines not only the advantages of mediation, arbitration and technology, but also their disadvantages. Nonetheless, we have already learned the holistic principle that the whole is always **more** than the sum of its parts. It seems that at least in this context, three is *not* a crowd.

³⁰⁵ COLIN RULE, ONLINE DISPUTE RESOLUTION FOR BUSINESS: B2B, E-COMMERCE, CONSUMER, EMPLOYMENT, INSURANCE, AND OTHER COMMERCIAL CONFLICTS 89 (2002).